No. 02-1541	Status: ARGUED
Title:	Iowa, Petitioner
	v.
	Felipe Edgardo Tovar
Docketed:	April 23, 2003
Lower Ct:	Supreme Court of Iowa
Case Nos.:	(168/01-1558)
Decision Date:	January 23, 2003

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 18 2003	Petition for writ of certiorari filed. (Response due May 23, 2003)
May 22 2003	Waiver of right of respondent Felipe Edgardo Tovar to respond filed.
May 27 2003	DISTRIBUTED for Conference of June 12, 2003.
Jun 9 2003	Response Requested . (Due July 9, 2003)
Jul 7 2003	Motion for leave to proceed in forma pauperis filed by respondent Felipe Edgardo Tovar.
Jul 7 2003	Brief of respondent Felipe Edgardo Tovar in opposition filed.
Jul 21 2003	Reply of petitioner Iowa filed.
Jul 23 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 30 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Sep 30 2003	Petition GRANTED.
Nov 3 2003	SET FOR ARGUMENT Wednesday, January 21, 2004.
Nov 14 2003	Joint appendix filed.
Nov 14 2003	Brief of petitioner Iowa filed.
Nov 14 2003	Brief amicus curiae of National District Attorneys Associations filed.
Nov 14 2003	Brief amicus curiae of United States filed.
Nov 14 2003	Brief amici curiae of Colorado, et al. filed.
Nov 24 2003	Record received from the Supreme Court of Iowa. (1 envelope)
Nov 24 2003	Record received from the District Court, Johnson County. (1 envelope)
Nov 25 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 26 2003	CIRCULATED.
Dec 11 2003	Brief of respondent Felipe Edgardo Tovar filed. (Distributed)
Dec 12 2003	Brief amici curiae of National Legal Aid & Defender Association, et al. filed. (Distributed)
Dec 19 2003	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. Distributed)
Dec 30 2003	Letter of petitioner proposing a lodging.
Jan 9 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 20 2004	Lodging of petitioner consisting of 20 copies of Iowa District Court file no. SRCR024089 & OWCR023989 received.
Jan 21 2004	Argued. For petitioner: Thomas J. Miller, Attorney General, Des Moines, Iowa; and on behalf of the United States, as amicus curiae, Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Theresa R.

Wilson, Des Moines, Iowa.

Supreme Court, U.S.
FILED

No. 02-1541

APR 18 2003

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In The

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

vs.

FELIPE EDGARDO TOVAR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Sixth Amendment require a court to give a rigid and detailed admonishment to a *pro se* defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risks overlooking a defense?

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LOWER COURT DECISIONS

The Johnson County, Iowa District Court denied Defendant Felipe Edgardo Tovar's Application for Adjudication of Law Points on May 14, 2001. (App. 37). On May 25, 2001, the district court conducted a stipulated bench trial and convicted Tovar of Third Offense Operating While Intoxicated (OWI) and Driving While Barred. Iowa Code §§ 321J.2, 321.561 (2001). (App. 34).

Tovar appealed and the Iowa Court of Appeals affirmed his conviction on June 19, 2002. (App. 30).

Tovar sought further review, which the Iowa Supreme Court granted on September 20, 2002 and set the case for consideration without oral argument. (App. 31).

On January 23, 2003, the Iowa Supreme Court issued the opinion from which the State of Iowa now appeals, *State v. Tovar*, 656 N.W.2d 112 (Iowa 2003). (App. 1).

JURISDICTION

The Iowa Supreme Court held that the Sixth Amendment prevents use of a prior conviction for enhancement purposes if the trial court at the plea on the prior conviction had not advised the *pro se* defendant of three things: (1) that an attorney can be useful and that there are disadvantages in proceeding without counsel; (2) that there are defenses which might not be known to laypersons, and the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked; and (3) that by waiving the right to counsel, defendant loses the opportunity to obtain an independent opinion on whether, under the facts and

applicable law, it is wise to plead guilty. The court vacated the earlier decision of the Iowa Court of Appeals, reversed the judgment of the Johnson County District Court and remanded for entry of judgment without enhancement by Tovar's prior OWI conviction.

The Iowa Supreme Court's opinion presents a federal issue and is a final judgment for purposes of this Petition. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 478-80 (1975). The Iowa Supreme Court's opinion rests solely on the Sixth Amendment right to counsel and not on any adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

This Court now has jurisdiction. 28 U.S.C. §§ 1257(a), 2102.

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. United States Constitution, Amendment 6.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

II. Iowa Code § 321J.2 (2001).

> 1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in any of the following conditions:
>
> a. While under the influence of an alcoholic beverage or other drug or combination of such substances.
>
> b. While having an alcohol concentration of .10 or more.
>
> * * *
>
> 2. A person who violates subsection 1 commits:
>
> a. A serious misdemeanor for the first offense, punishable by all of the following:
>
> (1) Imprisonment in the county jail for not less than forty-eight hours. . . .
>
> * * *
>
> b. An aggravated misdemeanor for a second offense, and shall be imprisoned in the county jail . . . not less than seven days. . . .
>
> c. A class "D" felony for a third offense and each subsequent offense, and shall be imprisoned in the county jail for a determinate sentence of not more than one year but not less than thirty days, or committed to the director of the department of corrections. . . .

III. Iowa Rule of Criminal Procedure 2.8(2)(b)

> *Pleas of guilty*. The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty

without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine the defendant understands, the following:

(1) The nature of the charge to which the plea is offered.

(2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

(3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.

(4) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.

(5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

The court may, in its discretion and with the approval of the defendant, waive the above procedures in a plea of guilty to a serious or aggravated misdemeanor.

STATEMENT OF THE CASE

The Plea Court And Ruling On Waiver Of Counsel

The Johnson County Attorney charged Felipe Edgardo Tovar on December 14, 2001 with operating while intoxicated as a third offense and with driving while license barred. Iowa Code §§ 321J.2(2)(c), 321.561 (2001). (App. 38-39). Tovar applied for an adjudication of law points, contending that an OWI conviction from 1996 in Story County, Iowa, could not be used to enhance his present offense from OWI 2nd to OWI 3rd because the record did not show he knowingly, voluntarily and intelligently waived his right to counsel before pleading guilty. (App. 2-3). Tovar claimed the district court neglected to discuss, among other things, an admonishment of the usefulness of an attorney. (App. 27).

At Tovar's 1996 arraignment in Story County, the following colloquy took place:

> THE COURT: Mr. Tovar appears without counsel and I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And are you charged in your true and correct name?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did you want me to read that information to you or did you want to waive the reading?
>
> THE DEFENDANT: Waive the reading.

THE COURT: And how do you wish to plead?

THE DEFENDANT: Guilty.

* * *

THE COURT: Mr. Tovar, your age?

THE DEFENDANT: Twenty-one.

THE COURT: Your education?

THE DEFENDANT: Currently in college.

THE COURT: So you, of course, read and write the English language?

THE DEFENDANT: Yes.

* * *

THE COURT: . . . [I]f you continue with this desire to plead guilty, there are certain rights that each one of you will be giving up and I now will explain those rights to you. First of all, if you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a trial of any kind on your charge. Do you understand that . . . Mr. Tovar?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: If you would enter a plea of not guilty, not only would you have a right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge

and jury on your behalf. But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial. Do you understand that . . . Mr. Tovar?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Mr. Tovar . . . you have been charged with operating while intoxicated. That charge carries a maximum penalty of up to a year in jail and up to a $1000.00 fine and the mandatory minimum fine [sic] of two days in jail and a $500.00 fine. Do you understand that, Mr. Tovar?

THE DEFENDANT: Yes, sir.

(App. 24-26).

The sentencing court conducted nearly the same colloquy. Before pronouncing sentence, the court asked the following:

> THE COURT: Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?
>
> THE DEFENDANT: No, I will represent myself.
>
> THE COURT: Mr. Tovar, has anyone promised you anything or threatened you in any way in

order to convince you to proceed here today without having an attorney present?

THE DEFENDANT: No, sir.

(App. 26-27). The court then sentenced Tovar to a brief period in the county jail. (App. 7).

Upon review of these transcripts, the Johnson County District Court in 2001 denied Tovar's motion to adjudicate law points, noting:

> The degree of inquiry necessary to assure a valid waiver varies with the nature of the offense and the ability of the defendant to understand the process. Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of [the] right to counsel and a willingness to proceed without counsel in the face of such awareness.

(App. 36-37). (citations omitted)

The Iowa Court Of Appeals And *Patterson v. Illinois*

Tovar appealed and the Iowa Court of Appeals affirmed. Relying on *State v. Cashman*, 491 N.W.2d 462, 465 (S.D. 1992), the Iowa Court of Appeals observed:

> [T]he appropriate test for waiver [of counsel] prior to a guilty plea proceeding is "whether the accused was made sufficiently aware of his right to have counsel present; and whether the accused was made sufficiently aware of the possible consequences of a decision to forego the aid of counsel."

Quoting *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988). (App. 29). Applying this test, the Court of Appeals concluded Tovar validly waived his right to counsel because the court advised him of his right to have counsel present and informed him of the ultimate adverse consequences of his guilty plea, namely the maximum possible punishment for his offense. (App. 29-30).

The Iowa Supreme Court And *United States v. Akins*

The Iowa Supreme Court granted Tovar's request for further review and set the matter for consideration without oral argument. (App. 31). In a 4-3 decision, the Iowa Supreme Court vacated the Iowa Court of Appeals' decision, reversed the district court and remanded the case for entry of judgment without considering Tovar's 1996 OWI conviction. (App. 19).

The Iowa Supreme Court recognized that the requirements for a valid waiver of the right to counsel at a guilty plea hearing "are subject to some dispute." (App. 9).

The Iowa Supreme Court rejected the proposition that a valid guilty plea colloquy required by Iowa Rule of Criminal Procedure 2.8(2)(b) adequately conveys to a defendant the danger of continuing without counsel. (App. 10-11). Moreover, the court stated:

> Although a layperson can readily understand what it means to drive while intoxicated, he or she will most likely be unaware of the prerequisites for invoking implied consent and the other statutory and constitutional restrictions on police action that might provide a basis for suppression

of the evidence of intoxication, which is usually the only meaningful defense available.

(App. 15).

Relying on Ninth Circuit precedent, the Iowa Supreme Court held that a plea court must advise a defendant pleading guilty *pro se*: (1) of the usefulness of an attorney and the dangers of self-representation; (2) that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense may be overlooked (although "the court is not expected . . . [to discuss] with the defendant the various defenses"); and (3) that by waiving the right to an attorney, the defendant will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. *See United States v. Akins*, 276 F.3d 1141, 1148 (9th Cir. 2002). (App. 18).

The three dissenting justices stated the majority opinion "is an extreme measure that unnecessarily depreciates the consequences of a criminal conviction based on defendant's solemn confession of guilt in open court." (App. 19). The dissent observed the opinion was "not pragmatic in any sense," but a "rigid standard." (App. 20). Tovar was aware of his right to have counsel present and "fully aware of the penal consequences that might befall him if he went forward without counsel and pleaded guilty." (App. 21). Unidentified potential defenses that an able lawyer might advance amounted to "speculation." (App. 21).

Adverse Impact Of The State Supreme Court Decision

The Iowa Supreme Court's decision has a broad and deep impact on Iowa law. The reasoning inhibits the guilty plea process which forms the bulk of criminal case dispositions here and elsewhere. Guilty pleas accounted for disposition of 64,402 cases in United States District Courts in 2001 and 872,001 felony dispositions in state courts in 1998, or 85% and 94% of dispositions, respectively. *Sourcebook of Criminal Justice Statistics 2001*, pp. 445, 419.

Like many other states, Iowa has numerous offenses for which the penalties increase based on earlier convictions. *See, e.g.*, Iowa Code §§ 123.46, 123.91 (public intoxication enhancement); §§ 124.401, 124.411 (controlled substance possession); § 708.2A (domestic abuse assaults); § 708.7 (harassment); § 708.11 (stalking); § 709.11 (sexual assault); § 713.6A(2) (burglary); § 902.8 (habitual offender sentencing enhancement) (2003).

If left to stand, this decision allows defendants to challenge *any* guilty plea, prior or current, entered without an attorney. 28 U.S.C. § 2254(d)(1) (2003) (allowing writ of habeas corpus where decision is contrary to federal law); Iowa Code § 822.2(1) (allowing post-conviction relief where the conviction violated the State or Federal constitution).

For the future, prosecuting attorneys in Iowa must reduce charges for second, third and subsequent offenses to a lesser offense when faced with the practical difficulty of obtaining aged transcripts and filings in otherwise settled convictions. Even if such records are found, it is not

likely any court would have followed the colloquy crafted by the *Tovar* majority.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

THE SUPREME COURT SHOULD DECIDE THE IMPORTANT, UNRESOLVED FEDERAL QUESTION OF THE REQUIREMENTS FOR A VALID WAIVER OF COUNSEL AT A GUILTY PLEA. NINETEEN STATE COURTS AND FEDERAL CIRCUITS HAVE SPLIT OVER THE ISSUE AND THE IOWA SUPREME COURT'S DECISION PROVIDES DETAILED REASONING AND STANDS ON AN UNCONTESTED, FULLY DEVELOPED RECORD.

A. The Supreme Court Has Not Decided The Issue.

The Supreme Court has not specifically addressed the requirements for waiver of counsel at a guilty plea in a State prosecution. *See People v. Dunn*, 158 N.W.2d 404, 407 (Mich. 1968); 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 21.3(a), at 113 (2nd ed. 1999); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 826 (1989).

This case falls, conceptually, within a gap between waiver of counsel at post-indictment questioning and waiver of counsel at trial. *Compare Patterson*, 487 U.S. at 298 *with Faretta v. California*, 422 U.S. 806, 835-36 (1975).

At one end, post-indictment questioning, *Miranda* warnings sufficiently apprise a defendant of his right to counsel and the consequences of proceeding alone. *Patterson*, 487 U.S. at 298. At the other end, waiver of counsel for a *trial*, a much more searching inquiry is necessary,

including an advisory of the dangers and disadvantages of proceeding without counsel to trial. *Faretta*, 422 U.S. at 835-36.

Well before *Faretta* or *Patterson*, a plurality of this Court touched on the waiver of counsel in the broader context of a voluntary guilty plea. *Von Moltke v. Gillies*, 332 U.S. 708 (1948). There, defendant pleaded guilty after a protracted failure to secure or be allowed to speak with counsel. *Von Moltke*, 332 U.S. at 713-15. Justice Black, speaking for the plurality, stated:

> To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defense to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Id. at 724.

As discussed in the section below, lower courts either follow *Patterson's* instruction for courts to take a "pragmatic" approach to waivers of counsel, or the *Von Moltke* plurality's expression of the necessary components of a guilty plea colloquy, or an approach not countenanced by either decision. *See* 3 LaFave, Israel & King, *Criminal Procedure* § 11.3(b), at 542, 545-46.

The nearest opportunity this court has had to directly address the issue arose roughly thirty years ago in *Boyd v. Dutton*, 405 U.S. 1 (1972). There, no transcript of the plea or sentencing existed. *Boyd*, 405 U.S. at 1. Since the record was virtually empty, the court remanded the matter for an evidentiary hearing. *Id.* at 2-3.

Nichols v. United States provided an opportunity to discuss the issue, but the Court eschewed doing so because it held the right to counsel never attached in the first place. 511 U.S. 738, 741 fn. 4 (1994).

This court should inform the state and federal courts what minimum requirements the Sixth Amendment sets for waiver of counsel at a guilty plea.

B. Nineteen State And Federal Courts Have Split Over The Issue.

A majority of states which have considered the question have held the Sixth Amendment requires no more of a plea court than an advisory that defendant is entitled to counsel and information bearing on the consequences of pleading guilty, including the maximum and minimum sentence, as well as the nature of the charges, the right to trial by jury, proof beyond a reasonable doubt, subpoena powers, the right to confront witnesses, the right to testify, the right against self-incrimination, whether there was a plea agreement (and, if so, its terms) and the right to appeal. *See In re Johnson*, 398 P.2d 420, 427 (Cal. 1965); *State v. Maxey*, 873 P.2d 150, 154 (Idaho 1994); *State v. Strain*, 585 So.2d 540, 543-44 (La. 1991); *Dunn*, 158 N.W.2d at 407; *State v. Green*, 178 N.W.2d 271, 272-73 (Neb. 1970); *Cashman*, 491 N.W.2d at 465-66; *Johnson v. State*, 614 S.W.2d 116, 119-20 (Tex. Ct. Crim. App. 1981).

These cases stress that laypersons can easily grasp the guilty plea procedure and the pitfalls of self-representation without further advisories. *See, e.g., Maxey*, 873 P.2d at 154; *Strain*, 585 So.2d at 544; *Cashman*, 491 N.W.2d at 465.

In addition to guilty plea proceedings being comprehensible by the lay public, numerous states have concluded the elements of drunk driving, specifically, are self-explanatory. *See, e.g., Maxey*, 873 P.2d at 154; *State v. Rater*, 568 N.W.2d 655, 660 (Iowa 1997); *Strain*, 585 So.2d at 544.

California has noted the needless practical difficulties associated with more extensive procedures for *pro se* guilty pleas to simple offenses, especially, the "unending stream of traffic violations, drunk cases, vagrancies, and similar petty offenses." *In re Johnson*, 398 P.2d at 427.

> [P]robably the vast majority of citizens haled into court on traffic violations share the judge's interest in prompt disposition of their cases, feeling themselves sufficiently inconvenienced by having to make personal appearances in the first place. To require a judge to orally examine each such defendant at length for the purpose of determining his capability of defending himself would seem to be an idle and time-wasting ritual.

Id. Therefore, for simple and lightly punished crimes, a California judge need not advise a defendant that self-representation is unwise. *People v. Torres*, 96 Cal. App. 3d 14, 19 (Cal. Ct. App. 1979).

Generally, these courts hold the Sixth Amendment does not require courts to advise defendants of the pitfalls of self-representation where the court advises of the right to counsel and defendant enters an otherwise valid plea. *Strain*, 585 So.2d at 543-44; *Cashman*, 491 N.W.2d at 465; *Johnson*, 614 S.W.2d at 119-20. Drunk driving convictions in particular entered following a *pro se* guilty plea may therefore enhance a later offense in these states. *Maxey*, 873 P.2d at 156; *Strain*, 585 So.2d at 544; *State v. Louthan*,

595 N.W.2d 917, 926 (Neb. 1999); *Cashman*, 491 N.W.2d at 465-66; *State v. Finstad*, 866 S.W.2d 815, 817 (Tex. Ct. App. 1993).

Other jurisdictions insist the Sixth Amendment mandates a qualitatively different approach to waivers of counsel during a guilty plea. *See Swensen v. Municipality of Anchorage*, 616 P.2d 874, 877-78 (Alaska 1980); *State v. Rubin*, 409 N.W.2d 504, 506 (Minn. 1987); *Commonwealth v. Payson*, 723 A.2d 695, 703 (Pa. Super. Ct. 1999); *Watts v. State*, 556 S.E.2d 368, 371 (S.C. 2001). These states either require a full *Faretta* colloquy, *Watts*, 556 S.E.2d at 371 and *Payson*, 723 A.2d at 703, or an explanation of the advantages of counsel, *Swensen*, 616 P.2d at 877.

By court rule, Minnesota takes the most extreme position requiring counsel to advise the defendant on the waiver of counsel. *Rubin*, 409 N.W.2d at 506. Wisconsin encourages courts to alert the defendant that a lawyer may assist in ways he or she might not expect. Wis. Jury Instruction – Criminal Special Materials 30 at 5-6.

So long as this patchwork of rules exists, valid convictions in some states will not receive full force and effect in other states.

The Iowa Court Relied On A Minority Circuit Position

The Iowa Supreme Court relied on the Ninth Circuit decision in *United States v. Akins*, 276 F.3d 1141 (9th Cir. 2002). *Akins* itself emanates from a series of decisions within the Circuit and holds that even with a complete advisory of the right to counsel and the consequences of a conviction, *Faretta* requires a greater discussion of the

dangers and disadvantages of self-representation at a guilty plea. *Id.* at 1146-47; *see also United States v. Fuller*, 941 F.2d 993, 995-96 (9th Cir. 1991) (holding "the accused must appreciate the possible consequences of mishandling the case and must be aware that a lawyer's experience and professional training may be of great benefit"); *United States v. Gillings*, 568 F.2d 1307, 1308-09 (9th Cir. 1978) (holding *Faretta* applies to waiver of counsel at guilty plea, that defendant must understand the charges and "the manner in which an attorney can be of assistance"). The *Akins* court believed that even if a defendant believed he was "'guilty' in a layman's sense" he might be unaware of the technical rules surrounding the charge and thus the Sixth Amendment would not allow his conviction to stand. *Id.* at 1148.

The Ninth Circuit also relied on the Third Circuit's expressed view that a layperson lacks the ability to comprehend a guilty plea proceeding. *United States ex rel. McDonald v. Commonwealth of Pennsylvania*, 343 F.2d 447, 451 (3rd Cir. 1965). The *McDonald* holding does not, however, go so far as the Ninth Circuit. Rather, the Third Circuit equates the requirements for waiver of counsel with the constitutional mandate for a voluntary and intelligent guilty plea itself. *Id.* citing *Von Moltke*, 332 U.S. at 724.

The Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits take a different approach. *See United States v. Gallop*, 838 F.2d 105, 110 (4th Cir. 1988); *Aiken v. United States*, 296 F.2d 604, 607 (4th Cir. 1961); *Molignaro v. Smith*, 408 F.2d 795, 799 (5th Cir. 1969); *United States v. Miller*, 910 F.2d 1321, 1325 (6th Cir. 1990); *Day v. United States*, 357 F.2d 907, 910 (7th Cir. 1966); *United States ex rel. Miner v. Erickson*, 428 F.2d 623, 627-28 (8th

Cir. 1970); *Stano v. Dugger*, 921 F.2d 1125, 1145 (11th Cir. 1991). These Circuits have recognized a variety of considerations play into both the constitutionality of waiver and the reversible nature of error, if any.

The Fourth Circuit recognizes the majority of circuits do not follow a "formalistic, deliberate and searching inquiry," but rather that "[a]t a minimum the district court should, before permitting an accused to waive his right to counsel, explain the charges and punishments." *Gallop*, 838 F.2d at 110. The failure to do so does not require reversal where, for example, the defendant rejects counsel for the purpose of delaying trial. *Id.* at 110-11.

Similar to the Fourth Circuit, the Fifth Circuit has said that at a minimum, a court must:

> (1) explain the charges and the possible punishment, (2) inquire whether any threats or pressures have been brought to bear on him, and (3) determine whether any promises have been made to him by the investigating or prosecuting officials.

Molignaro, 408 F.2d at 800. *Molignaro*, like the Seventh Circuit's *Day* decision, instructs generally that a court should discuss with defendant the *Von Moltke* plurality factors: apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses to the charges and circumstances in mitigation, and all other facts essential to a broad understanding of the whole matter. *Id.*; *Day*, 357 U.S. at 910.

The Sixth Circuit holds that a valid waiver of counsel occurs where the accused is informed of the right to

counsel and the maximum possible penalty. *Miller*, 910 F.2d at 1324-25, fn. 3.

In sum, although a split exists, the majority of Circuits understands that awareness of the right to counsel at a guilty plea and knowledge of the maximum possible penalties for conviction ensures a valid waiver of counsel. Nevertheless, because of the split, convictions in the majority of federal courts will not be valid for enhancement purposes in the Third or Ninth Circuits or many states.

Commentators Compound The Uncertainty Over The Issue

Secondary sources also offer conflicting views of the required practice for waiver of counsel at a guilty plea. One source presumes that *Faretta* applies to the guilty plea context, but notes the matter "is not beyond dispute" because some of that decision's reasoning applies only to the trial setting. 5 LaFave, Israel & King, *Criminal Procedure* § 21.3(a), at 113, fn. 22.

Even so, this source posits that in the trial context, lower courts have "generally rejected the view 'that a waiver, to be [constitutionally] valid, must emerge from a colloquy between trial judge and defendant covering every factor specified by Justice Black'" in the *Von Moltke* decision. 3 LaFave, Israel & King, *Criminal Procedure* § 11.3(b), at 542, 545-46. The commentator states, nevertheless, that courts should employ "an especially careful procedure in a guilty plea context because of defendant's likely ignorance of what assistance of counsel can provide even if there will be no trial." 5 LaFave, Israel & King, *Criminal Procedure* § 21.3(a), at 113.

The *Benchbook for U.S. District Court Judges* effectively instructs federal courts to conduct a *Faretta* colloquy with defendants pleading guilty. *Benchbook for U.S. District Court Judges* § 2.01 fn. 1 (4th ed. March 2000 rev.). This general colloquy discusses the defendant's understanding that the rules of evidence and criminal procedure apply and admonishes the defendant:

> I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

Id. § 1.02, p. 5.

The American Bar Association has authored the most aggressive source on the subject. ABA Standards for Criminal Justice, *Providing Defense Services* Std. 5-8.2(b), p. 102-06 (3rd ed. 1992); *compare id.* Std. 6-3.6 (2nd ed. 1980). The ABA would require provision of counsel for both misdemeanor and felony prosecutions and "[n]o waiver should be accepted unless the accused has at least once conferred with a lawyer." *Id.* Std. 5-8.2(b), p. 102. The ABA bases its standards upon a reading of *Von Moltke* and the notion that "[a]n accused who expresses a desire to proceed without counsel may sometimes fail to understand fully the assistance a lawyer can provide." *Id.* Std. 5-8.2 Commentary, p. 104-05.

The National Conference of Commissioners on Uniform State Laws has taken the ABA's position, requiring a court to satisfy itself that the defendant:

> fully understands . . . that a defense lawyer can render important assistance . . . in the event of a plea, in consulting with the prosecuting attorney as to the possible reduced charges or lesser penalties, and in presenting to the court matters that might lead to a lesser penalty.

Unif. R. Crim. P. 711(a), 10 U.L.A. 193 (2001).

Moreover, in the Conference's view, in a misdemeanor case a court should – and in a felony case, must – "refuse to accept a waiver of counsel unless a lawyer consults with the defendant before the defendant waives counsel." *Id.* 711(b). This, incidentally, runs counter to this Court's statement that the Sixth Amendment does not *require* the opinion of a lawyer before pleading guilty. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277 (1942). "Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice." *Id.*

C. The Iowa Supreme Court's Erroneous Decision Is Suitable For Review.

The Iowa Supreme Court's decision propagates the Ninth Circuit's minority view of the Sixth Amendment. The decision does, however, provide detailed reasoning and rests upon an uncontested, complete factual record which will facilitate Supreme Court review.

No judicial view requires as extensive or intrusive a colloquy as the Iowa Supreme Court. Iowa now requires, at a minimum, that a district court perform a unique inquiry: 1) advise the defendant – and presumably ensure understanding of – "the usefulness of an attorney and the dangers of self-representation;" 2) "advise the defendant

generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked;" and 3) admonish the defendant that "by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty." *Tovar*, 656 N.W.2d at 121 (App. 18-19).

To be sure, this Court has recognized the special importance of the right to counsel. *See Custis v. United States*, 511 U.S. 485, 494-95 (1994); *Brady v. United States*, 397 U.S. 742, 748, fn. 6 (1970).

On the other hand, the Iowa Supreme Court does not heed this Court's observation that the Constitution "does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *United States v. Ruiz*, 536 U.S. ___, ___, 122 S.Ct. 2450, 2456 (2002).

Neither does the Iowa Supreme Court majority give credence to this Court's recognition that the validity of a waiver of counsel has pragmatic components, including promoting the finality of judgments and the difficulty of obtaining aged records from other jurisdictions. *Custis*, 511 U.S. at 496.

Requiring a discussion of the benefits of an independent legal opinion or the other matters required by the Iowa Supreme Court needlessly prolongs the plea process. *See Ruiz*, 536 U.S. at ___, 122 S.Ct. at 2457 (requiring the Government to provide information related to possible

defenses prior to "fast-track" plea would deprive the plea bargaining process of its resource saving advantages or lead the Government to curtail plea-bargaining.) The colloquy itself will further congest courts' dockets and, if the plea entry must be postponed, the process will be fruitlessly delayed. *See In re Johnson*, 398 P.2d at 427.

Practically, such a discussion will pointlessly inhibit prosecution of repeat offenders. Since Iowa has adopted a minority position, no conviction from the majority of Federal Circuits or from any state apart from Minnesota will comply with Iowa's view of the Sixth Amendment and, hence, cannot serve to enhance a later offense.

The decision unnecessarily depreciates the consequences of a settled conviction, one that can no longer be challenged through post-conviction relief or *habeas corpus*. *See Tovar*, 656 N.W.2d at 121 (Carter, J., in dissent) (App. 19-20). The *Tovar* majority imposes a "rigid standard" on district courts, the failure of which minimizes the consequences of a defendant's "solemn confession of guilt in open court" *Id.* The majority's decision fails to conform to *Patterson v. Illinois*' teaching that a "pragmatic approach" should be taken. *Id.* at 122.

Like an arrestee informed of his *Miranda* rights who elects to make an incriminating statement, Felipe Tovar knew the full consequences of proceeding without counsel and entering a guilty plea. *See Patterson*, 487 U.S. at 292-93. The Iowa Supreme Court erred by concluding otherwise when it put an unwarranted, paternalistic gloss on the Sixth Amendment.

CONCLUSION

For all the reasons stated above, this Court should grant *certiorari* to address the Sixth Amendment requirements for a valid waiver of counsel at a guilty plea.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 168 / 01-1558

Filed January 23, 2003

STATE OF IOWA,

Appellee,

vs.

FELIPE EDGARDO TOVAR,

Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Johnson County, Amanda P. [sic] Potterfield and Larry J. Conmey, Judges.

Defendant seeks further review of court of appeals decision affirming his conviction of operating while intoxicated, third offense, contending prior OWI conviction was improperly used to enhance current charge. **DECISION OF COURT OF APPEALS VACATED; JUDGMENT OF DISTRICT COURT REVERSED AND CASE REMANDED.**

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, J. Patrick White, Johnson County Attorney, and Victoria Dominguez, Assistant County Attorney, for appellee.

TERNUS, JUSTICE.

The defendant, Felipe Tovar, challenges his conviction, after a bench trial, of third-offense operating while intoxicated (OWI). He claims his first OWI conviction should not have been used to enhance the penalty for his current conviction because his prior conviction resulted from an uncounseled guilty plea, and he had not made a valid waiver of his Sixth Amendment right to counsel at the guilty plea proceeding. The district court and the court of appeals rejected Tovar's argument.

Upon our review of the record and the parties' legal arguments, we conclude the defendant's waiver of his right to counsel was not a knowing and intelligent waiver and, therefore, his prior conviction should not have been used for enhancement purposes in the present criminal proceedings. Accordingly, we vacate the court of appeals decision and reverse the district court's judgment of conviction. The case is remanded for further proceedings consistent with this opinion.

I. *Background Proceedings.*

On December 14, 2000, Tovar was charged with OWI, third offense, a class D felony, and driving while license barred, an aggravated misdemeanor. *See* Iowa Code §§ 321J.2, 312.561 (1999). The enhancement of the OWI charge to a third offense was based upon Tovar's two prior convictions for OWI.

Tovar pled not guilty to both of the current charges, and filed a motion to adjudicate law points asserting that his first OWI conviction could not be used to enhance the pending OWI charge. He argued his guilty plea in the

prior proceeding had been uncounseled and there had not been a knowing and intelligent waiver of his right to an attorney. The district court ruled Tovar's waiver of counsel in the prior case was valid, and consequently denied Tovar's motion.

The present case proceeded to trial before the court and Tovar was found guilty of both charges. After sentencing, Tovar appealed his OWI conviction, alleging the district court erred in allowing his first OWI conviction to be used to enhance his current conviction. The court of appeals affirmed the district court's ruling on the defendant's motion to adjudicate law points, and this court granted further review.

II. *Issue on Appeal and Standard of Review.*

The parties agree that a prior conviction resulting from an uncounseled guilty plea for which there was an invalid waiver of counsel may not be used to enhance a subsequent offense where the prior conviction resulted in incarceration. *See Baldasar v. Illinois,* 446 U.S. 222, 226, 100 S. Ct. 1585, 1587, 64 L. Ed. 2d 169, 173-74 (1980) (holding a "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment"), *overruled in part by Nichols v. United States,* 511 U.S. 738, 749, 114 S. Ct. 1921, 1928, 128 L. Ed. 2d 745, 755 (1994) (holding uncounseled convictions could enhance later offenses provided no incarceration was imposed in the first prosecution); *State v. Cooper,* 343 N.W.2d 485, 486 (Iowa 1984) (holding, where defendant had not been advised of her right to counsel in two prior prosecutions for simple misdemeanor theft, the State was precluded from using the prior convictions to enhance a

third charge of theft to an aggravated misdemeanor). There is also no disagreement that Tovar was not represented by an attorney when he pled guilty to his first OWI charge nor that he expressed the desire to waive his right to counsel at the guilty plea hearing. The dispute in this case centers on whether Tovar's waiver of his right to counsel at the time he pled guilty was valid under the Sixth Amendment.

Although our standard of review for constitutional issues is de novo, *see In re Detention of Williams,* 628 N.W.2d 447, 451 (Iowa 2001), there is no factual dispute in this case. The only issue for our determination is whether the district court correctly determined that the undisputed facts established the defendant had made a knowing and intelligent waiver of his right to counsel at the plea proceeding on his first OWI charge.

III. *Waiver of Right to Counsel in First OWI Prosecution: Undisputed Facts.*

In 1996, Tovar, a college student in Ames, was brought before the Story County district court to plead to a charge of OWI, first offense. At the time, the district court was receiving guilty pleas from several defendants collectively. The judge engaged the defendant in the following discussion. References to the defendant's right to counsel are emphasized.

> The Court: We are on the record in the State of Iowa versus Felipe Tovar, Case No. 23989. This is the time and place set for arraignment on a trial information charging the defendant with operating while intoxicated. Mr. Tovar appears without counsel and *I see, Mr. Tovar, that you waived*

> *application for a court appointed attorney. Did you want to represent yourself at today's hearing?*
>
> Tovar: *Yes, sir.*
>
> . . . .
>
> The Court: And did you want me to read that information to you or did you want to waive the reading?
>
> Tovar: Waive the reading.
>
> The Court: And how do you wish to plead?
>
> Tovar: Guilty.
>
> . . . .
>
> The Court: All right. Gentlemen, if you continue with this desire to plead guilty, there are certain rights that each one of you will be giving up and I now will explain those rights to you. First of all, if you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a trial of any kind on your charge.
>
> Do you understand that, Mr. [Tovar]?
>
> Tovar: Yes, sir.
>
> . . . .
>
> The Court: *If you would enter a plea of not guilty, not only would you have a right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf.*

But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial.

Do you understand that, Mr. [Tovar]?

Tovar: Yes, sir.

[The court then continued to review the other trial-related rights the defendants would be giving up by pleading guilty.]

The Court: Gentlemen, those are the rights that you will be giving up if you plead guilty. Knowing that, did you still want to plead guilty?

Mr. [Tovar]?

Tovar: Yes, sir.

(Emphasis added.)

After this colloquy, the judge determined whether there was a factual basis for Tovar's guilty plea. He explained to the defendant that there were two elements to his offense: (1) operating a motor vehicle (2) while he was intoxicated. The court then informed the defendant that intoxication could be shown by an alcohol level of .10 or above or by evidence that "the consumption of alcohol has affected your judgment or your reasoning or your faculties or it has caused you to lose control in any manner." Tovar admitted driving a car and, although he did not contest his blood alcohol test results of .194, he denied feeling any effects of the alcohol. The judge concluded there was a factual basis for Tovar's guilty plea and then accepted the plea.

At a later sentencing hearing, Tovar again appeared pro se. The only discussion of Tovar's right to counsel was the following exchange:

> The Court: Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court-appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?
>
> Tovar: No, I will represent myself.

The court then conducted essentially the same colloquy used at the guilty plea proceeding and pronounced sentence. Tovar's sentence included a brief stint in the county jail.

IV. *Did Tovar Validly Waive His Sixth Amendment Right to Counsel in His First OWI Prosecution?*

A. *General legal principles.* The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This protection extends to state prosecutions. *State v. Spencer,* 519 N.W.2d 357, 359 (Iowa 1994).

To provide a framework for our consideration of whether this right was accorded to the defendant in his first prosecution for OWI, we quote the observations of the United States Supreme Court on the importance of the right to counsel:

The ". . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

Johnson v. Zerbst, 304 U.S. 458, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461, 1466 (1938) (citation omitted). As this discussion illustrates, the right to counsel is not solely a trial-related right; a defendant is "entitled to the assistance of counsel at all critical stages of the proceedings." *State v. Hindman,* 441 N.W.2d 770, 772 (Iowa 1989); *accord Kirby v. Illinois,* 406 U.S. 682, 688-89, 92 S. Ct. 1877, 1881-82, 32 L. Ed. 2d 411, 417 (1972).

A decision to plead guilty is one of those critical stages. *See Von Moltke v. Gillies,* 332 U.S. 708, 721, 68 S. Ct. 316, 322, 92 L. Ed. 309, 319-20 (1948). Thus, a defendant has the right to an attorney when he enters a guilty plea unless there has been a valid waiver of that right. *Id.* at 720-21, 68 S. Ct. at 321-22, 92 L. Ed. at 319. The desirability of legal advice during plea proceedings exists for misdemeanor cases as well as felony cases: "Counsel is needed [in misdemeanor cases] so that the accused may know precisely what he is doing, so that he is fully aware

of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." *Argersinger v. Hamlin,* 407 U.S. 25, 33, 92 S. Ct. 2006, 2011, 32 L. Ed. 2d 530, 536 (1972).

Although it is well established a defendant has a right to counsel at a guilty plea hearing on an offense that may result in incarceration, the requirements for a valid waiver of that right are subject to some dispute. At a fundamental level, it is clear that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (1970). What constitutes an adequate awareness of relevant circumstances and likely consequences necessarily depends on the context within which the waiver occurs. *See State v. Cooley,* 608 N.W.2d 9, 15 (Iowa 2000) (stating the "trial court's inquiry may vary depending on the nature of the offense and the background of the accused"); *Hindman,* 441 N.W.2d at 772 ("The degree of inquiry which is required . . . varies with the nature of the offense and the ability of the accused to understand the process.").

In *Patterson v. Illinois,* 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988), the United States Supreme Court, considering the level of inquiry required in postindictment questioning, reasoned:

> [W]e have taken a more pragmatic approach to the waiver question – asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage – to determine the scope of the Sixth Amendment right

to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

At one end of the spectrum, we have concluded there is no Sixth Amendment right to counsel whatsoever at the postindictment photographic display identification, because this procedure is not one at which the accused "require[s] aid in coping with legal problems or assistance in meeting his adversary." At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. In these extreme cases, and in other[s] that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. *An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.*

487 U.S. at 298, 108 S. Ct. at 2397-98, 101 L. Ed. 2d at 275-76 (citations omitted) (emphasis added). The Court stated that in determining whether a waiver of counsel is knowing and intelligent, "the key inquiry" is whether the accused was "made sufficiently aware of his right to have counsel present" at the proceeding *and* "the possible consequences of a decision to forgo the aid of counsel." *Id.* at 292-93, 108 S. Ct. at 2395, 101 L. Ed. 2d at 272. Consistent with the directives of *Patterson,* our court has required at a minimum that the defendant be "admonished

as to the usefulness of an attorney at [the] particular proceeding, and made cognizant of the danger of continuing without counsel." *Cooley,* 608 N.W.2d at 15; *accord State v. Martin,* 608 N.W.2d 445, 450 (Iowa 2000) (stating "[b]efore a trial court accepts the defendant's request to proceed pro se, the court must make the defendant 'aware of the dangers and disadvantages of self-representation' ").

B. *Parties' contentions.* Relying on our decision in *Cooley,* Tovar claims his prior waiver of counsel was not knowing and intelligent. He argues the district court failed to ensure the defendant understood "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof." *Cooley,* 608 N.W.2d at 15. Tovar also claims the court had a duty to admonish him as to the usefulness of having an attorney and to make him aware of the dangers of proceeding without counsel.

In contrast, the State claims the court was not required to engage the defendant in such a broad discussion "[g]iven the simplicity of the charge he faced and the proceeding in which he was representing himself." The State distinguishes cases in which such a colloquy has been found necessary, noting they involve defendants who have proceeded to trial. *See, e.g., Cooley,* 608 N.W.2d at 15; *Martin,* 608 N.W.2d at 450; *Hindman,* 441 N.W.2d at 772. The State argues that the present case is similar to the postindictment questioning addressed in *Patterson* where the Court concluded that *Miranda* warnings adequately imparted "the dangers and disadvantages of self-representation" to the accused so as to render his waiver of counsel at that stage of the proceedings "knowing and

intelligent." *Patterson,* 487 U.S. at 299, 108 S. Ct. at 2398-99, 101 L. Ed. 2d at 277. The State suggests the guilty plea colloquy required by Iowa Rule of Criminal Procedure 2.8(2)(*b*) performed the same function here that the *Miranda* warnings served in *Patterson.* It cites two cases in support of this proposition: *Stano v. Dugger,* 921 F.2d 1125, 1149 (11th Cir. 1991) and *State v. Cashman,* 491 N.W.2d 462, 463 (S.D. 1992).

C. *Discussion.* Before we evaluate the arguments of the parties, we think it is important to briefly discuss the one prior case in which this court has considered the validity of a waiver of counsel in a guilty-plea setting. In *State v. Moe,* 379 N.W.2d 347 (Iowa 1985), the defendant claimed his current OWI conviction was improperly enhanced based on a prior OWI conviction that resulted from an uncounseled guilty plea. 379 N.W.2d at 348. The record from the defendant's first prosecution for OWI showed the only inquiry concerning the defendant's waiver of counsel was the following question: "Do you understand an attorney would be provided for you at public expense if you are indigent?" *Id.* at 349. Despite the defendant's affirmative response to this question, he contended in his second OWI prosecution that his waiver of counsel was invalid because he had not been advised that his right to counsel extended to the plea proceeding as well as to trial. *Id.* A divided court rejected this contention, relying on the defendant's admission in the second case that he was aware of his right to counsel during the prior prosecution. *Id.* at 350.

Unfortunately, our decision in *Moe* provides little guidance in the present case due to *Moe's* narrow focus on whether the defendant understood the scope of his right to counsel. The court appeared to presume that so long as the

defendant was aware that he was entitled to counsel at the plea proceeding, his decision to forego that right constituted a knowing and intelligent waiver. *Moe* is also of limited value because subsequent to our decision in that case the United States Supreme Court rendered its decision in *Patterson,* making clear that a valid waiver requires more than a simple recognition that one has a right to counsel: the court must make the defendant aware of the "usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson,* 487 U.S. at 298, 108 S. Ct. at 2398, 101 L. Ed. 2d at 276.

Finding no definitive Iowa case to resolve the dispute before us, we turn initially to the cases upon which the State relies: *Stano,* 921 F.2d at 1125, and *Cashman,* 491 N.W.2d at 462. In *Stano,* the Eleventh Circuit Court of Appeals distinguished between the inquiry required for acceptance of a guilty plea and that required for waiver of the right to counsel. 921 F.2d at 1148-49. In the course of its discussion, the court noted that a defendant who pleads guilty need not be admonished of the dangers of proceeding pro se at trial as required by *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This observation does not, however, answer the question we face here.

Clearly, under *Patterson,* a waiver-of-counsel inquiry must be tailored to the proceeding at which counsel is waived. Thus, because the dangers of proceeding pro se at a guilty plea proceeding will be different than the dangers of proceeding pro se at a jury trial, the inquiries made at these proceedings will also be different. To simply conclude, as the State suggests, that a *Faretta*-type inquiry is not required at a guilty plea hearing does not answer the

ultimate question of what colloquy *is* required. That question was more directly addressed in the South Dakota case cited by the State.

In *Cashman,* the Supreme Court of South Dakota applied *Patterson* in considering the validity of a waiver of counsel at a guilty plea proceeding. 491 N.W.2d at 463-66. In that case, the defendant claimed his two prior convictions for driving under the influence (DUI) could not be used to enhance his current DUI conviction because the prior convictions resulted from uncounseled guilty pleas for which there had been no valid waivers of counsel. *Id.* at 462. In considering the inquiry needed to ensure that the defendant's waivers were knowing and intelligent, the court contrasted a guilty plea proceeding with the postindictment questioning at issue in *Patterson*:

> The full dangers and disadvantages of self-representation in the entry of a guilty plea might not be as insubstantial as those involved in the post-indictment questioning at issue in *Patterson*. However, they are even more obvious to an accused fully advised of the charges, the elements of the offenses, his constitutional and statutory rights, the maximum possible penalties, and the fact that a plea of guilty would waive these rights.

Id. at 465. The court then reviewed the defendant's prior guilty plea proceedings and concluded valid waivers had occurred:

> During the course of both proceedings, Cashman was advised of his right to counsel and to court appointed counsel if he was indigent. In both proceedings, Cashman indicated his understanding of his right to counsel. Thus, it is beyond

> dispute that Cashman was aware of his right to counsel. Also as in *Patterson,* it is obvious that Cashman had to know "what a lawyer could 'do for him' . . ." during the entry of his plea, namely: advise him to plead not guilty. Clearly, by having been advised of the maximum possible penalties for his offenses, Cashman was aware of the "ultimate adverse consequence . . ." he could suffer by entering an uncounseled guilty plea.

Id. at 465-66 (citations omitted). In essence, the court found the colloquies used to accept the defendant's guilty pleas were also adequate to render his waivers of counsel knowing and intelligent.

We find the *Cashman* court's analysis overly simplistic. To say that an attorney would merely advise a defendant to plead not guilty characterizes a lawyer's role as one-dimensional when in fact it is multi-faceted. A lawyer will know what defenses might be available to the crime charged. A lawyer will also know what questions to ask to determine whether such defenses might be factually viable.

The State minimizes the need for an attorney at an *OWI* guilty plea proceeding, however, based on "the simplicity of the charge." We are not persuaded. Although a layperson can readily understand what it means to drive while intoxicated, he or she will most likely be unaware of the prerequisites for invoking implied consent and the other statutory and constitutional restrictions on police action that might provide a basis for suppression of the evidence of intoxication, which is usually the only meaningful defense available. The United States Supreme Court aptly stated the importance of counsel at this critical stage:

> A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman even though acutely intelligent.

Von Moltke, 332 U.S. at 721, 68 S. Ct. at 322, 92 L. Ed. at 319-20 (citation omitted).

Given these considerations, we think the colloquy undertaken by the court in Tovar's first OWI prosecution was inadequate. We note initially that the discussion between Tovar and the court with respect to the usefulness of counsel at trial did not suffice to advise Tovar of the value of counsel at the plea stage. *See Patterson,* 487 U.S. at 298, 108 S. Ct. at 2398, 101 L. Ed. 2d at 276 (stating the court must make the defendant aware of the "usefulness of counsel to the accused *at the particular proceeding*" (emphasis added)). Not only was there an absence of any dialogue concerning the value of having an attorney when pleading guilty, there was no colloquy with Tovar that alerted him to the dangers and disadvantages of entering a guilty plea without the advice of counsel. Importantly, the court did not warn Tovar that he might have legal defenses to the charge that he, as a layperson, would not recognize. As one court has noted,

> "Substantive criminal law contains many complexities – intent standards, jurisdictional provisions, defenses, and so forth. The defendant may be 'guilty' in a layman's sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime."

United States v. Akins, 276 F.3d 1141, 1148 (9th Cir. 2002) (citation omitted).

Under circumstances similar to those presented in the case before us, the Ninth Circuit Court of Appeals held in *Akins* that a waiver of counsel at a guilty plea hearing on a misdemeanor charge was not valid where the defendant had not been admonished of the dangers of self-representation. *Id.* We agree with that court's analysis:

> The purpose of the constitutional right to counsel "is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." Nowhere is counsel more important than at a plea proceeding. "[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney."

Id. at 1147 (citations omitted). The court also rejected an argument that the courts would be overburdened if judges were required to warn a defendant of the disadvantages of proceeding without counsel:

> Because a defendant must already appear before the court to enter a guilty plea, a brief exchange regarding the waiver of counsel should not significantly increase the burden on the courts. . . . It is the duty of the courts to safeguard the fundamental right to liberty by ensuring that a

> defendant's waiver of the right to counsel is knowing and intelligent.

Id. at 1148-49.

V. *Summary and Disposition.*

In summary, a defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel. In fulfilling this requirement in a case such as the one before us, the court is not expected to assume the role of an attorney, discussing with the defendant the various defenses that might be available. Rather, the trial judge need only advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked. The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. In addition, the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments. Only with this information can the defendant make an informed and intelligent decision whether to forgo the assistance of counsel given the risks and possible outcomes.

Here, the State's only proof of the knowing and intelligent nature of Tovar's waiver of counsel in his first OWI prosecution is the court's plea colloquy with the defendant. Because the district court did not engage Tovar in any

meaningful discussion concerning his waiver of counsel at the plea proceeding, we cannot conclude that Tovar understood the usefulness of counsel at that stage or knew the dangers and disadvantages of proceeding pro se. As a result, the record does not support a finding that Tovar's waiver of counsel was made knowingly and intelligently. Therefore, it was error for the district court to allow the State to use Tovar's prior conviction of first-offense OWI to enhance the current charge to a third-offense OWI.

We vacate the court of appeals decision affirming the defendant's conviction. We also reverse the district court's judgment of conviction and remand for entry of judgment without consideration of the defendant's prior OWI conviction based on his uncounseled guilty plea.

DECISION OF COURT OF APPEALS VACATED; JUDGMENT OF DISTRICT COURT REVERSED AND CASE REMANDED.

All justices concur except Carter, J. who dissents. Neuman and Streit, JJ. join the dissent.

CARTER, Justice (dissenting).

I respectfully dissent.

The result reached in the opinion of the court is an extreme measure that unnecessarily depreciates the consequences of a criminal conviction based on defendant's solemn confession of guilt in open court. At the time of his guilty plea, defendant was fully advised of his right to counsel and elected to forego being represented. Defendant's earlier OWI conviction is still on his record and will remain that way because the statute of limitations for

seeking postconviction relief has now run. To permit a collateral attack on the earlier conviction in the present litigation should only be permitted on a convincing showing that defendant was not guilty with regard to the first OWI conviction or that some compelling federal authority requires that it be disregarded for sentencing enhancement purposes. Neither of these circumstances exists in the present case.

The opinion of the court correctly suggests that a pragmatic approach should be taken in determining whether a waiver of right to counsel is knowingly and voluntarily made. That is the teaching of *Patterson v. Illinois,* 487 U.S. 285, 298, 108 S. Ct. 2389, 2397-98, 101 L. Ed. 2d 261, 275-76 (1988). But, the standard that the majority of this court applies is not pragmatic in any sense. It is a rigid standard which requires that the party seeking to waive counsel must, in all instances, be expressly advised of the dangers that exist in proceeding without counsel.

Prior to the Court's decision in *Patterson,* we approached the problem of determining whether a waiver of counsel was knowing and voluntary solely on the basis of whether the accused had been properly advised of the right to counsel. *State v. Moe,* 379 N.W.2d 347, 348 (Iowa 1985). The *Patterson* case has injected another consideration, which is whether the accused is aware of the consequences of proceeding without counsel. However, nothing in *Patterson* suggests that a waiver of counsel is never voluntary unless an express admonition concerning the potential adverse effect of that decision is given the accused. Quite the contrary is true. *Patterson* recognized that the accused's knowledge of the consequences of proceeding without counsel could be inferred from his

having been given *Miranda* warnings. *Patterson,* 487 U.S. at 293-94, 108 S. Ct. at 2395-96, 101 L. Ed. 2d at 272-73.

In the present case, the State argues persuasively that Tovar was sufficiently made aware of the adverse consequences that might befall him from the district court's guilty-plea admonition. In addition to advising Tovar concerning his waiver of the constitutional rights described in the opinion of the court, he was also advised concerning both the maximum and mandatory minimum sentences that would befall him upon a plea of guilty. He was therefore made fully aware of the penal consequences that might befall him if he went forward without counsel and pleaded guilty.

It is true that there are other adverse consequences that might arise from proceeding without counsel. A search for these consequences leads the court into speculation concerning unidentified potential defenses that an able lawyer might have advanced. I submit that it is not reasonable to ignore the consequences of a voluntary guilty plea based on that type of speculation. As the Supreme Court observed in *Patterson*:

> If petitioner [after having been advised of his right to counsel in a *Miranda* warning] nonetheless lacked "a full and complete appreciation of all of the consequences flowing" from this waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum.

Id. (quoting *Oregon v. Elstad,* 470 U.S. 298, 316-17, 105 S. Ct. 1285, 1296-97, 84 L. Ed. 2d 222, 236-37 (1985)). The showing of the State in *Patterson* did not include evidence that an express admonition of the dangers that existed in

proceeding without counsel had been given the accused. Nevertheless, the Court found that the waiver was knowingly and voluntarily made. I would reach the same result in the present case. I would affirm the judgment of the district court.

Neuman and Streit, JJ., join this dissent.

IN THE COURT OF APPEALS OF IOWA

No. 2-330/01-1558
Filed June 19, 2002

STATE OF IOWA,

Plaintiff-Appellee,

vs.

FELIPE EDGARDO TOVAR,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Amanda P. [sic] Potterfield and Larry J. Conmey, Judges.

Felipe Tovar appeals from the judgment and sentence following his conviction for operating while intoxicated, third offense, and driving while license barred in violation of Iowa Code sections 321J.2 and 321.561 (1999). **AFFIRMED**.

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, J. Patrick White, County Attorney, and Victoria Dominguez, Assistant County Attorney, for appellee.

Considered by SACKETT, C.J., and HUITINK and HECHT, JJ.

HECHT, J.

Felipe Tovar appeals from the judgment and sentence following his conviction for operating while intoxicated, third offense, and driving while license barred in violation of Iowa Code sections 321J.2 and 321.561 (1999). We affirm.

I. Factual Background and Proceedings. On the evening of December 7, 2000, Iowa City Police Officer Steve Kivi observed Felipe Tovar driving without his headlights illuminated. When Kivi stopped the vehicle, Tovar handed him an Illinois driver's license that belonged to his passenger. Another officer arrived shortly thereafter and both detected a strong odor of alcohol and signs of intoxication. The officers administered a preliminary breath test, which indicated a blood alcohol concentration of .148. Tovar was arrested and taken to the Iowa City police station where he declined to provide a breath sample.

The State charged Tovar with operating while intoxicated (OWI), third offense,[1] and driving while license barred.[2] Tovar pled not guilty to both charges. Tovar filed a motion for adjudication of law points regarding a 1996 OWI conviction entered upon a guilty plea. In his motion, Tovar contended the 1996 conviction could not be used to enhance his OWI charge because his plea was uncounseled. At Tovar's 1996 arraignment, the following colloquy took place:

> THE COURT: Mr. Tovar appears without counsel and I see, Mr. Tovar, that you waived application

[1] Tovar pled guilty to operating while intoxicated in 1996 and 1998.

[2] Tovar was barred from driving until May 20, 2003.

> for a court appointed attorney. Did you want to represent yourself at today's hearing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And are you charged in your true and correct name?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did you want me to read that information to you or did you want to waive the reading?
>
> THE DEFENDANT: Waive the reading.
>
> THE COURT: And how do you wish to plead?
>
> THE DEFENDANT: Guilty.
>
> * * *
>
> THE COURT: Mr. Tovar, your age?
>
> THE DEFENDANT: Twenty-one.
>
> THE COURT: Your education?
>
> THE DEFENDANT: Currently in college.
>
> THE COURT: So you, of course, read and write the English language?
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: . . . if you continue with this desire to plead guilty, there are certain rights that each one of you will be giving up and I now will explain those rights to you. First of all, if you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a

trial of any kind on your charge. Do you understand that . . . Mr. Tovar?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: If you would enter a plea of not guilty, not only would you have a right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf. But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial. Do you understand that . . . Mr. Tovar?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Mr. Tovar . . . you have been charged with operating while intoxicated. That charge carries a maximum penalty of up to a year in jail and up to a $1000.00 fine and the mandatory minimum fine (sic) of two days in jail and a $500.00 fine. Do you understand that, Mr. Tovar?

THE DEFENDANT: Yes, sir.

During the 1996 plea proceedings, the following relevant exchange, regarding waiver of counsel, took place:

THE COURT: Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?

THE DEFENDANT: No, I will represent myself.

THE COURT: Mr. Tovar, has anyone promised you anything or threatened you in any way in order to convince you to proceed here today without having an attorney present?

THE DEFENDANT: No, sir.

Tovar's motion for adjudication of law point asserted his waiver of counsel in 1996 was not knowing, intelligent, and voluntary because the district court failed to address the following five matters during the 1996 colloquy: (1) the possible defenses to the charge, (2) circumstances of mitigation, (3) that OWI is an enhanced penalty offense, (4) an admonishment of the usefulness of an attorney, and (5) the danger of proceeding without an attorney. The district court found Tovar's waiver of counsel was voluntary, knowing, and intelligent and denied the relief requested in the motion. The court held a stipulated bench trial and found Tovar guilty on both charges. Tovar appeals.

II. Standard of Review. We review the ruling of the district court on the defendant's motion to adjudicate law points for the correction of legal error. *State v. Mann,* 463 N.W.2d 883, 883 (Iowa 1990). To the extent Tovar's claims raise constitutional issues, our review is de novo. *State v. Moe,* 379 N.W.2d 347, 350 (Iowa 1985).

III. MERITS. Tovar contends the district court erred in overruling his motion to adjudicate law points. Tovar argues his current conviction cannot be enhanced from OWI second to OWI third because his waiver of counsel in his 1996 plea was not knowingly and voluntarily made.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to self-representation. *State v. Martin,* 608 N.W.2d 445, 449-50 (Iowa 2000). "Before the right to self-representation attaches, the defendant must voluntarily elect to proceed without counsel by 'knowingly and intelligently' waiving his or her Sixth Amendment right to counsel." *Id.* at 450 (quoting *Faretta v. California,* 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582 (1975)). A valid waiver requires an understanding of the nature of the charges, the statutory offenses included within them, the range of allowable defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *State v. Cooley,* 608 N.W.2d 9, 15 (Iowa 2000) (citations omitted). Furthermore, a criminal defendant must be "admonished as to the usefulness of an attorney at the particular proceeding, and made cognizant of the danger of continuing without counsel." *Id.* (citations omitted).

The State concedes the district court failed to address the five items listed in Tovar's motion; however, the State contends a full admonition of the dangers of self-representation is not required when a defendant enters a guilty plea to a criminal charge. The State argues the authorities cited by Tovar, including *Martin* and *Cooley,*

concern self-representation *at trial* and are not applicable to self-representation in a guilty plea.

In support of this contention the State relies primarily on *State v. Cashman,* 491 N.W.2d 462, 462 (S.D. 1992), where the defendant challenged the enhancement of his sentence for driving under the influence contending "his two prior convictions failed to reflect a knowing and intelligent waiver of his right to counsel prior to entry of the uncounseled guilty pleas on which the convictions were based." *Id.* In *Cashman,* the South Dakota Supreme Court determined a *Faretta*-type inquiry is not required for waiver of counsel at every stage of the criminal process. *Id.* at 464. The court noted the significant differences between a defendant considering proceeding *pro se* at trial and a defendant "making a decision to waive counsel in the earlier stages of the criminal process." *Id.*

The court held the appropriate test for waiver prior to a guilty plea proceeding is "whether the accused was made sufficiently aware of his right to have counsel present; and whether the accused was made sufficiently aware of the possible consequences of a decision to forego the aid of counsel." *Id.* at 465 (citing *Patterson v. Illinois,* 487 U.S. 285, 292-93, 108 S. Ct. 2389, 2395, 101 L. Ed. 2d 261, 272 (1988)). The court concluded all the requirements were met for a valid waiver of counsel prior to the entry of Cashman's guilty pleas because he was advised of his right to counsel, had indicated his understanding of that right, and was advised of the maximum possible penalties for his offense. *Cashman,* 491 N.W.2d at 466. We find this reasoning persuasive and adopt it as our own.

Applying the test in *Cashman,* we conclude Tovar validly waived his right to counsel prior to entry of the

1996 uncounseled guilty plea. Tovar was advised of his right to counsel and made sufficiently aware of what counsel could do for him at trial. *See Moe,* 379 N.W.2d at 350 (holding defendant's waiver of counsel knowing and voluntary when he testified at a later proceeding that he "understood before he pleaded guilty that an attorney would be provided for him" and was advised of his right to jury trial). *See also State v. Hindman,* 441 N.W.2d 770, 772 (Iowa 1989) ("Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of right to counsel and a willingness to proceed without counsel in the face of such awareness"). Furthermore, Tovar was informed of the ultimate adverse consequences he could suffer as he was advised of the maximum possible penalties for the offense.

Because there was a valid waiver of counsel in obtaining Tovar's 1996 conviction, his present conviction was appropriately enhanced. *See Moe,* 379 N.W.2d at 349 (holding "uncounseled prior convictions may be used for enhancement purposes in subsequent proceedings when the defendant has validly waived the right to counsel in the earlier proceedings"). Accordingly, we conclude the district court did not err in ruling on Tovar's motion to adjudicate law points.

AFFIRMED.

IN THE SUPREME COURT OF IOWA

No. 01-1558

Johnson County No. OWCR057355

ORDER

(Filed Sep. 20, 2002)

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FELIPE EDGARDO TOVAR,
Defendant-Appellant.

After consideration by this court en banc, further review of the above-captioned case is granted.

The issues presented for review will be submitted to this court during the week beginning November 4, 2002. The parties will be notified of the date and time of submission about one month in advance.

The court will consider the previously-filed papers. No supplemental briefs will be required.

The parties will not be heard in oral argument.

Dated this 20th day of September, 2002.

THE SUPREME COURT OF IOWA

By /s/ Louis A. Lavorato
Louis A. Lavorato,
Chief Justice

Copies to:

State Appellate Defender
Attn: Theresa R. Wilson
Lucas bldg.
LOCAL

Attorney General
Attn: Darrel Mullins
Hoover Bldg.
LOCAL

VERDICTS AND ORDERS

Filed May 25, 2001

IN THE IOWA DISTRICT COURT IN
AND FOR JOHNSON COUNTY

STATE OF IOWA, Plaintiff, vs. FELIPE EDGARDO TOVAR, Defendant.	)	No. OWCR057355 VERDICTS AND ORDERS (Filed May 25, 2001)

Defendant appeared in open court this date with his counsel, Emily Hughes. The State was represented by Assistant County Attorney Karen Egerton.

Defendant waived his right to a jury trial, without resistance by the State. The Court accepts Defendant's waiver of jury trial. The parties proceeded to a stipulated trial on the basis of the Minutes of Testimony filed December 14, 2000, and previously filed motions and orders. At the request of the parties, the Court takes judicial notice of the two pages of Minutes of Testimony; Judge Conmey's order dated May 14, 2001; the Motion for Adjudication of Law Points filed March 22, 2001, as well as the Memorandum in Support of the Motion for Adjudication of Law Points filed May 8, 2001.

The Court finds the evidence proves beyond a reasonable doubt that Defendant is guilty of the two crimes charged in the Trial Information, that is, (Count I) Operating While Intoxicated as a Third Offender, in violation of Iowa Code Section 321J.2, and (Count II) Driving While Barred, in violation of Iowa Code Section 321.561.

Time for sentencing is set for the 13th day of July, 2001, at 9:00 a.m. A presentence investigation is to be prepared by a representative of the Sixth Judicial District Department of Correctional Services. The original report and two copies shall be filed with the office of the Clerk of Court seven days prior to the sentencing date.

The attorney for the Defendant, if court appointed, shall promptly prepare her statement for services rendered to the Defendant, current to date filed.

IT IS FURTHER ORDERED that the County Attorney shall promptly prepare a statement of pecuniary damages to victims of Defendant's criminal activity. The Clerk of Court shall promptly prepare a statement of Court-appointed attorney fees or expenses of a public defender, if any, and court costs in connection with this matter. Both statements shall be provided to the presentence investigator.

At the time of sentencing, restitution will be ordered in the amount set out in the statement of pecuniary damages filed unless the Defendant gives notice of any objections thereto in writing prior to sentencing.

The Defendant's bond shall remain as previously set.

Clerk to furnish a copy of this order to counsel of record.

Dated this 24th day of May, 2001.

/s/ Amanda Potterfield
AMANDA POTTERFIELD, Judge
Sixth Judicial District of Iowa

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

STATE OF IOWA, Plaintiff, vs. FELIPE TOVAR, Defendant.	)	OWCR 057355 **RULING** (Filed May 14, 2001)

Hearing on the Application for Adjudication of Law Points filed by Defendant and the Resistance thereto came before the Court on May 9, 2001. The parties filed a Joint Stipulation on May 8, 2001, stating that State's Exhibit A, a transcript from the Story County Court dated November 18, 1996, and State's Exhibit B, a transcript from the Story County Court dated December 30, 1996, accurately reflect the colloquy between the Court and Defendant Tovar. The parties further waived their right to oral argument in this matter. Upon review of the file, the Court finds that said Application should be denied.

I.R.Civ.P. 116 states that upon application of a party the court must "separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case." The Iowa Supreme Court has previously approved the use of adjudication of law points in criminal cases under I.R.Crim.P. 10(2), which states in part, "any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." *See State v. Wilt,* 333 N.W.2d 457, 460 (Iowa 1983). Such an adjudication is proper only when the legal questions presented

arise from uncontroverted pleadings or stipulated facts. *See State v. Hawkins,* 356 N.W.2d 197 (Iowa 1984).

The question of whether or not Defendant's current charge may be enhanced to a Third Offense, based on defendant Tovar's voluntary, knowing, and intelligent waiver of his right to counsel in Story County OWCR023989, is purely a legal question, which is appropriate for resolution in a motion to adjudicate law points. Defendant asserts his waiver is invalid as the Court failed to make him aware of the dangers and disadvantages of self-representation. Defendant cites *State v. Rater,* 568 N.W.2d 655, 660 (Iowa 1997).

A defendant has a Sixth Amendment right to legal representation. *State v. Stephenson,* 608 N.W.2d 778, 782 (Iowa 2000), *cites omitted*. In accordance with this right, a criminal defendant may proceed without an attorney and conduct his own defense. *Id.* However, before a trial court honors the defendant's request to waive the right to counsel, the court must determine the defendant's election is voluntary, knowing, and intelligent. *Id.* In making this determination, courts are required to engage the defendant in a colloquy sufficient to apprise the defendant of the dangers and disadvantages inherent in self-representation. *Id.*

The degree of inquiry necessary to assure a valid waiver varies with the nature of the offense and the ability of the defendant to understand the process. *Id.*; *State v. Rater*, 568 N.W.2d at 660, *citing State v. Hindman,* 441 N.W.2d 770, 772 (Iowa 1989). Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of

[the] right to counsel and a willingness to proceed without counsel in the face of such awareness. *Hindman,* supra. The Court has specifically found operating a motor vehicle while under the influence of alcohol is an offense readily understood by laypersons. *Rater,* 568 N.W.2d at 660, *citing Hindman,* 441 N.W.2d at 772.

Pursuant to the precedent set forth in *Rater* and *Hindman,* the Court finds Defendant's waiver of counsel in Story County OWCR023989 was voluntary, knowing, and intelligent. Therefore, the relief requested by Defendant in his Application for Adjudication of Law Points should be denied.

RULING

IT IS THEREFORE ORDERED that the relief requested in Defendant's Application for Adjudication of Law points is DENIED.

Clerk to Notify.

/s/ Larry J. Conmey
LARRY J. CONMEY, JUDGE
SIXTH JUDICIAL DISTRICT
OF IOWA

TRIAL INFORMATION

Filed December 14, 2000

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

THE
STATE OF IOWA
339610000

vs.

FELIPE EDGARDO TOVAR
2402 Bartelt Road #2B
Iowa City, IA 52240

TRIAL INFORMATION

No. OWCR057355

Iowa Code Sec. 321J.2

DOB: 01-26-75

COMES NOW *M. Victoria Dominguez*, as Prosecuting Attorney for Johnson County, Iowa, and in the name and by the authority of the State of Iowa, accuses the said *Felipe Edgardo Tovar* of the following crimes:

Count I

Operating While Under the Influence of Alcohol or a Drug or While Having an Alcohol Concentration of 0.10 or More – Third Offense

committed as follows: The said *Felipe Edgardo Tovar* on or about the *7th day of December, 2000*, in the County of Johnson, State of Iowa, did *operate a motor vehicle while under the influence of an alcoholic beverage or other drug or a combination of such substances*, in violation of *Section 321L2* of the 1999 Iowa Code, *said Defendant having previously been convicted of the crime of Operating while*

Intoxicated in Cause No. OWCR023989, in the Story County District Court, State of Iowa, on or about the 30th of December, 1996; again, said Defendant having previously been convicted of the crime of Operating while Intoxicated in Cause No. OWCR046170, in the Johnson County District Court, State of Iowa, on or about March 16, 1998.

Count II:

Driving while Barred

committed as follows: The said *Felipe Edgardo Tovar*, on or about the *7th day of December, 2000*, in the County of Johnson, State of Iowa, did *operate a motor vehicle upon a public roadway while his driving privilege or license was barred, to-wit: Defendant's driving privilege was barred under Section 321.560 of the Iowa Code on May 20, 1998 and remained barred until May 20, 2003*, in violation of *Section 321.561*, of the 1999 Code of Iowa.

A TRUE INFORMATION

/s/ M. Victoria Dominguez

M. VICTORIA DOMINGUEZ
339610023
PROSECUTING ATTORNEY

APPROVAL AND ORDER FOR ARRAIGNMENT

This information and the Minutes of Evidence accompanying it have been examined by me and found to contain sufficient evidence, if unexplained to warrant a conviction by a trial jury, the filing of this information is approved by me on this 14th day of December, 2000.

ARRAIGNMENT IS SCHEDULED TO BE HELD AT THE JOHNSON COUNTY COURTHOUSE ON December 21, 2000, at 1:00 P.M.

If you require the assistance of auxiliary aids or services to participate in court because of a disability, immediately call your district ADA coordinator at 1-319-398-3920, ext. 200. (If you are hearing impaired, call Relay Iowa TTY at 1-800-735-2942).

✓ Previously ordered conditions of release shall continue.

___ Defendant is released on personal recognizance.

___ Bond is set in the amount of $_____.

___ Bond may be unsecured.

___ Bond must be cash or secured in the full amount.

___ 10% cash may be posted.

___ Clerk of Court shall issue a summons for Defendant to appear.

___ Clerk of Court shall issue an arrest warrant.

___ Defendant shall report to the Johnson County Sheriff's Office to undergo booking procedures on or before the date set for arraignment

___ Defendant's personal appearance for arraignment is required.

___ Defendant may, prior to the time set for his arraignment, file herein a written arraignment and plea of not guilty.

Failure to appear for arraignment as ordered or, if authorized, to file timely a written arraignment, will result in forfeiture of the appearance bond on file.

However, bond forfeiture will not necessarily result in dismissal of the charge.

/s/ Douglas S. Russell
JUDGE

(7)

NO. 02-1541

JUL 7 2003

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner

vs.

FELIPE EDGARDO TOVAR,

Respondent.

PROOF OF SERVICE

I, Theresa R. Wilson, do swear or declare that on this date, July 7, 2003, as required by Supreme Court Rule 29, I have served the Attached Motion to Proceed in Forma Pauperis and Respondent's Brief in Opposition on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Thomas J. Miller, Attorney General of Iowa, Hoover Building, 2nd Floor, Des Moines, IA 50319

Douglas R. Marek, Deputy Attorney General, Hoover Building, 2nd Floor, Des Moines, IA 50319

Darrel Mullins, Assistant Attorney General, Hoover Building, 2nd Floor, Des Moines, IA 50319

35 pp

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 7, 2003.

Respectfully submitted,

THERESA R. WILSON
Counsel of Record
Assistant Appellate Defender
Lucas Building, 4th Floor
321 East 12th Street
Des Moines, IA 50319
(515) 281-8841
Counsel for Respondent

NO. 02-1541

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner

vs.

FELIPE EDGARDO TOVAR,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent asks leave to file the attached Respondent's Brief in Opposition without prepayment of costs and to proceed in forma pauperis.

Respondent has previously been granted leave to proceed in Johnson County District Court for Iowa; Iowa Court of Appeals; and Iowa Supreme Court.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Respectfully submitted,

THERESA R. WILSON
Counsel of Record
Assistant Appellate Defender
Lucas Building, 4th Floor
321 East 12th Street
Des Moines, IA 50319
(515) 281-8841
Counsel for Respondent

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

respondent

I, Felise Tovar, am the ^ in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$
Interest and dividends	$ 0	$ 0	$ 0	$
Gifts	$ 0	$ 0	$ 0	$
Alimony	$ 0	$ 0	$ 0	$
Child Support	$ 0	$ 0	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$	$
Disability (such as social security, insurance payments)	$ 0	$ 0	$	$
Unemployment payments	$ 0	$ 0	$	$
Public-assistance (such as welfare)	$ 0	$ 0	$	$
Other (specify): Loans yearly T.R.W.	$ 10,000	$ 0	$	$
Total ~~monthly~~ income: yearly T.R.W. (computes to $833.33/mo) T.R.W.	$ 10000	$ 0	$	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other:	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 1,000	$ total due
Department store(s)	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 300	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify):	$ 0	$
Total monthly expenses:	$ 300	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
MCI	Iowa City IA	Aug. 2000	$ 1000
		Aug. 2001	$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ 1,000
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
0		$ 0	$
		$ 1	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model 0
Value

☐ Motor Vehicle #2
Year, make & model 0
Value

☐ Other assets
Description 0
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
0	$ 0	$ 0
1	$	$
0	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Emilio Tovar	Son	5

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☒ No Is property insurance included? ☐ Yes ☒ No	$ 0	$ -
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ -
Home maintenance (repairs and upkeep)	$ 0	$ -
Food	$ 0	$ -
Clothing	$ 0	$ -
Laundry and dry-cleaning	$ 0	$ -
Medical and dental expenses	$ 0	$ -

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☒ Yes ☐ No If yes, describe on an attached sheet. expect to start working in Aug. '03 Full time

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Recently graduated from University of Iowa and I am looking for work at the current time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 1st, 2003

Felipe Tovar
(Signature)

SUBSCRIBED AND SWORN to before me by Felipe Tovar on the 1st day of July, 2003.

Renee D. Tadlock
Notary Public in and for said State

RENEE D. TADLOCK
Commission 136782
Expires 8/29/03

NO. 02-1541

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner

vs.

FELIPE EDGARDO TOVAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE IOWA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully submitted,

THERESA R. WILSON
Counsel of Record
Assistant Appellate Defender
Lucas Building, 4th Floor
321 East 12th Street
Des Moines, IA 50319
(515) 281-8841
Counsel for Respondent

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Iowa Supreme Court, under the Sixth and Fourteenth Amendments to the United States Constitution, may require a district court to advise a pro se defendant who wishes to plead guilty of the usefulness of an attorney, that an attorney may provide an independent opinion as to whether it is wise to plead guilty, and that without an attorney the defendant may overlook a defense?

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STATEMENT OF THE CASE

Respondent generally agrees with the facts of the case and course of proceedings as described in the Petition. Respondent respectfully disagrees, however, with Petitioner's claim that the Iowa Supreme Court's decision will have an adverse impact on the plea process and on prosecutors' ability to charge enhanced offenses. The substance of Respondent's disagreement on this issue is discussed in Section IV of the Reasons for Denying the Petition below.

REASONS FOR DENYING THE PETITION

I.

The Decision of the Iowa Supreme Court Rests on Established Precedent Set by the United States Supreme Court.

Petitioner asserts that the Iowa Supreme Court's decision "propagates the Ninth Circuit's minority view of the Sixth Amendment." (Petition at 21). While the Iowa Supreme Court did, in fact, make reference to a Ninth Circuit decision, the Iowa Supreme Court's rationale is consistent with established United States Supreme Court precedent.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In Gideon v. Wainwright, the United States Supreme Court determined that the right to assistance of counsel was a fundamental right applicable to the States via the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).

The United States Supreme Court has long recognized the importance of counsel to an accused. In Powell v. Alabama, this Court stated that "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Thus, due process requires that an accused be given time and opportunity to secure counsel. Id. at 53. The Sixth Amendment, in particular, "embodies a realistic recognition of the obvious truth that the

average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). The purpose of the Sixth Amendment is to protect defendants from convictions obtained based upon their "own ignorance of [their] legal and constitutional rights." Id. at 465.

The right to counsel attaches at all critical stages of a criminal proceeding, from arraignment through sentencing. Carter v. Illinois, 329 U.S. 173, 174 (1946). This includes a guilty plea proceeding. Boyd v. Dutton, 405 U.S. 1, 2 (1972)(per curiam); Rice v. Olson, 324 U.S. 786, 788 (1945).

This Court has addressed the particular usefulness of counsel during plea proceedings. "A plea of guilty is different in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction." Von Moltke v. Gillies, 332 U.S. 708, 719 (1948). The determination of guilt can be a complex legal task even for an educated and intelligent layperson. Id. at 721. The issue of guilt may turn on the legal construction of a statute, rather than admitted facts. Adams v. United States ex rel. McCann, 317 U.S. 269, 285 (1942)(Douglas, J., dissenting). "[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." Brady v. United States, 397 U.S. 742, 748 n.6 (1970). The provision of counsel during a guilty plea also protects a defendant from coercive conduct by the prosecution. Id. at 754. Counsel is needed [at a plea proceeding] so that the

accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." Argersinger v. Hamlin, 407 U.S. 25, 34 (1972).

Although an accused is entitled to the assistance of counsel at every critical stage of a criminal proceeding, an accused may choose to voluntarily and intelligently waive his right to counsel. Adams v. United States ex rel. McCann, 317 U.S. 269, 275. Such a waiver must be a voluntary, knowing, and intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." United States v. Ruiz, 536 U.S. 622, 629 (2002); Brady v. United States, 397 U.S. 742, 748 (1970). An accused must be made aware of the dangers of self-representation so that the record establishes he knows what he is doing "'with eyes open.'" Faretta v. California, 422 U.S. 806, 835 (1975). A judge has a duty to "investigate as long and as thoroughly as the circumstances of the case before him demand"; it is not enough for an accused to say that he has been informed of his right to counsel and wishes to waive it. Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948). The courts will indulge every reasonable presumption against waiver. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Following this established precedent, the Iowa Supreme Court determined that "a defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel." (Petition App. at 18). This advice, according to the Iowa Supreme Court, should consist of advising the

defendant: "generally that there are defenses to criminal charges that may not be known to laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked"; "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty"; and regarding "the nature of the charges against him and the range of allowable punishments." (Petition App. at 18). The Iowa Supreme Court specifically stated that the trial judge was not to assume the role of an attorney and was not expected to discuss particular defenses with an accused. (Petition App. at 18).

The decision of the Iowa Supreme Court considered the usefulness of counsel *at the plea proceeding*. It specifically noted that "the discussion between Tovar and the court with respect to the usefulness of counsel at trial did not suffice to advise Tovar of the usefulness of counsel at the plea stage." (Petition App. at 16). The Iowa Supreme Court specifically found that there was an "absence of any dialogue concerning the value of having an attorney when pleading guilty," that the trial court failed to alert Respondent to the dangers of entering a guilty plea without the advice of counsel, and that the court did not warn Respondent of the availability of legal defenses that "he, as a layperson, would not recognize." (Petition App. at 16).

Although the Iowa Supreme Court quoted favorably from United States v. Akins, 276 F.3d 1141 (9th Cir. 2002), the Iowa Supreme Court also rooted its decision in several United States Supreme Court cases. (Petition App. at 7-18). It cited Johnson v. Zerbst,

Von Moltke v. Gillies, and Argersinger v. Hamlin regarding the importance of counsel at critical stages of the plea proceedings, including guilty pleas. (Petition App. at 7-9). See Argersinger v. Hamlin, 407 U.S. 25 (1972); Von Moltke v. Gillies, 332 U.S. 708 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938). It cited Brady v. United States regarding the requirements for waiver of the right to counsel. (Petition App. at 9). See Brady v. United States, 397 U.S. 742 (1970).

Most notably, however, the Iowa Supreme Court cited Patterson v. Illinois for the proposition that courts should take a pragmatic approach to the waiver of counsel. (Petition App. at 9-10). See Patterson v. Illinois, 487 U.S. 285 (1988). In Patterson, the United States Supreme Court held that the waiver inquiry must take into consideration "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage." Id. at 298. The Court defined "the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." Id.

In Patterson, the question was the role of counsel at post-indictment questioning. Id. Because the role of counsel at postindictment questioning is "rather unidimensional", Miranda warnings were sufficient to advise the defendant of the dangers of self-representation. Id. at 294. The United States Supreme Court recognized, however, that "an attorney's role at postindictment questioning is rather limited, and substantially

different from the attorney's role in later phases of the criminal proceedings." Id. at 294 n.6.

The decision of the Iowa Supreme Court followed the Patterson rationale by considering the role of counsel at the plea proceeding. Instead of characterizing an attorney's role at a plea proceeding as unidimensional – advising a defendant whether to plead guilty or not guilty – the Iowa Supreme Court described the attorney's role as "multi-faceted." (Petition App. at 15). "A lawyer will know what defenses might be available to the crime charged" and "what questions to ask to determine whether such defenses might be factually viable." (Petition App. at 15).

Nor was the Iowa Supreme Court convinced that an attorney was of less use in an OWI case, where the concept of driving while intoxicated could be readily understood by non-lawyers. The Iowa Supreme Court recognized that the average layperson would likely be unaware of the proper procedures for invoking implied consent or grounds for suppressing evidence, "which is usually the only meaningful defense available." (Petition App. at 15).

The Iowa Supreme Court's rationale with respect to the "simplicity" of the charge finds support in various United States Supreme Court decisions regarding the importance of counsel in misdemeanor cases. This Court has recognized that the legal and constitutional questions involved in misdemeanor cases are no less complex simply because the charges are misdemeanors. Argersinger v. Hamlin, 407 U.S. 25, 33 (1972). Also, the volume of misdemeanor cases "may create an obsession for speedy dispositions,

regardless of the fairness of the result." Id. In such cases, the presence of counsel may dissipate the coercive pressure to plead guilty. Nichols v. United States, 511 U.S. 738, 763 (1994).

Thus, the decision of the Iowa Supreme Court is consistent with case law regarding the right to counsel established by this Court. The Iowa Supreme Court assessed the role counsel could play at a guilty plea proceeding and determined that an accused must be informed of the usefulness of counsel and the dangers of proceeding without counsel with respect to counsel's role at that particular proceeding. The decision of the Iowa Supreme Court does not treat the Sixth Amendment right to counsel with mechanical rigidities, but addresses the particular concerns of the right to counsel at the plea proceeding. Because the decision is consistent with established United States Supreme Court precedent regarding the right to counsel, the Petition should be denied.

II.

The Iowa Supreme Court did not Rely on a Minority Position

Petitioner asserts the Iowa Supreme Court relied on a minority view regarding the requirements for a valid waiver of the right to counsel at a plea proceeding. (Petition at 16-19). Respondent disputes Petitioner's characterization of lower court case law.

With respect to the federal circuit courts of appeals, it should be noted at the outset that relatively few decisions have discussed the particular issue of the requirements for a valid waiver of counsel at a guilty plea. When the issue has arisen, however, the circuit courts have generally adopted the same standards for reviewing the waiver.

The majority of the circuits addressing the issue have decided that a waiver of counsel is not voluntary and intelligent where a defendant is not advised of the dangers of self-representation or the usefulness of counsel at the particular proceeding. See, e.g., United States v. Salemo, 61 F.3d 214, 219-20 (3rd Cir. 1995)(holding the stage of proceedings was "clearly relevant to the content of the colloquy" and stating that the intricacies of the federal sentencing guidelines could be one factor to consider in determining whether a defendant "understands the perilous path he/she is going down in attempting to proceed to sentencing without benefit of counsel."); United States v. Miller, 910 F.2d 1321, 1324-25 (6th Cir. 1990)(applying the standards of United States v. McDowell, 814 F.2d 245, 249-50 (6th Cir. 1987)(adopting the model inquiry set forth in section 1.02-2 of the Bench Book for United States District Judges), to address the validity of Miller's waiver of counsel at a guilty plea); Shafer v. Bowersox, 329 F.3d 637, 647-48 (8th Cir. 2003)(holding plea court's colloquy was deficient at both the plea and sentencing proceedings because "the trial court asked few questions ... with respect to Shafer's waiver of counsel for the guilt phase," "did not advise him of the specific dangers or limitations related to self-representation," and "made no attempt o ... explain other services of counsel at the sentencing phase of a capital case."); United States v. Akins, 276 F.3d 1141, 1146-1148 (9th Cir. 2002)(holding that because counsel is critical at a plea proceeding, district courts must inform defendants of the dangers of proceeding without counsel at the plea proceeding and must inform defendants regarding "(1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and

disadvantages of self-representation."); Braun v. Ward, 190 F.3d 1181, 1186 (10th Cir. 1999)(upholding waiver of counsel at hearing to withdraw plea of nolo contendere but noting inquiry should focus on the purposes a lawyer can serve at the particular proceeding and what assistance the lawyer could provide at the proceeding).

In contrast, the Fourth Circuit has held that at a minimum a plea court should "(1) explain the charges and the possible punishment, (2) inquire whether any threats or pressures have been brought to bear on him, and (3) determine whether any promises have been made to him by the investigating or prosecuting officials." Aiken v. United States, 296 F.2d 604, 607 (4th Cir. 1961). The Fifth and Seventh Circuits require that a waiver be made "'with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.'" Molignaro v. Smith, 408 F.2d 795, 799 (5th Cir. 1969)(quoting Von Moltke v. Gillies, 332 U.S. 708, 724 (1948)); Day v. United States, 357 F.2d 907, 910 (7th Cir. 1966)(same).

The States appear to be equally divided on the form of the colloquy required to waive counsel at a guilty plea. Louisiana, Michigan, South Dakota, and Texas have specifically held that the Faretta inquiry is not required to waive counsel at a plea proceeding. See, e.g., State v. Strain, 585 So.2d 540 (La. 1991); People v. Schneider, 429 N.W.2d 845 (Mich. Ct. App. 1988); State v. Cashman, 491 N.W.2d 462 (S.D. 1992); Hatten v. State, 71 S.W.3d 332 (Tex. Crim. App. 2002). See also State v. Maxey, 873

P.2d 150, 154 (Idaho 1994)(holding waiver of counsel at guilty plea does not require warning of dangers of self-representation).

Other states require the colloquy to encompass a variation of the standards outlined in Von Moltke, whereby a waiver is not valid unless a defendant has an apprehension of the nature of the charges, included statutory offenses, the range of possible punishments, possible defenses, mitigating circumstances, and other facts essential to a broad understanding of the matter. Von Moltke v. Gillies, 332 U.S. 708, 724 (1948). See e.g., Garnick v. Miller, 403 P.2d 850 (Nev. 1965); In re Johnson, 398 P.2d 420 (Cal. 1965). See also People v. Christensen, 555 N.E.2d 422 (Illinois App. Ct. 1990)(holding court must conduct inquiry into defendant's understanding of the nature of the charge, the range of punishments, and his right to counsel, including appointed counsel); State v. Fulp, 558 S.E.2d 156 (N.C. 2002)(same, but adding that defendant appreciates the consequences of his decision); State v. Pollard, 657 A.2d 185 (Vt. 1995)(same as Fulp, but also inquiring into defendant's age, education and familiarity with English, and considering the complexity of the charge).

States such as Florida, Indiana and South Carolina have specifically held that the Faretta inquiry applies to guilty pleas. Clary v. State, 818 So.2d 686 (Florida Dist. Ct. App. 2002); Shelton v. State, 390 N.E.2d 1048 (Ind. Ct. App. 1979); Watts v. State, 556 S.E.2d 368 (S.C. 2001). Utah uses a variation of the Faretta and Von Moltke standards, requiring a court to advise a defendant as to his right to counsel and to ascertain whether a defendant possesses the intelligence and capacity to understand (1) the consequences of

self- representation, (2) that he will be expected to comply with court rules, and (3) the nature of the charges and proceedings, the range of allowable punishments and any other facts helpful to an understanding of the matter. State v. Arguelles, 63 P.3d 731, 750 (Utah 2003).

Florida has specified that a waiver must relate to the particular proceeding for which it is used. Brown v. State, 830 So.2d 203, 204-05 (Fla Dist. Ct. App. 2002). In fact, Florida requires a separate waiver of counsel at each critical stage of a criminal proceeding, even if the accused has waived his right to counsel previously. Id. Pennsylvania treats the waiver of counsel separate from the waiver of rights at a plea, and specifies six areas of inquiry that must be addressed with a defendant. Commonwealth v. Payson, 723 A.2d 695, 700-703 (Pa. 1999).

Other states prefer their courts to go into detail regarding the usefulness of an attorney. See, e.g., Swenson v. Municipality of Anchorage, 616 P.2d 874, 878 n.5 (Alaska 1980)(quoting from the Alaska Magistrate's checklist regarding the usefulness of an attorney); Shelton v. State, 390 N.E.2d 1048, 1051 (Ind. Ct. App. 1979)("it is better practice for the trial judge to emphasize the importance of the assistance of counsel and that counsel would assist the accused in evaluating the state's case against him, the possible defenses, if any, to the charge and the advantages and disadvantages of the alternative pleas"); People v. White, 436 N.E.2d 507 (N.Y. 1982)(vacating a guilty plea where trial court "did not utter a word, much less explain, the objectivity or professionalism counsel could supply").

As Petitioner notes, Minnesota is the most restrictive state when it comes to accepting uncounseled guilty pleas. (Petition at 16). Minnesota requires defendants to consult with an attorney before they will be allowed to enter a guilty plea. State v. Rubin, 409 N.W.2d 504, 506 (Minn. 1987). The waiver of counsel colloquy would then follow the Von Moltke standards. Id. at 505.

With respect to the circuit courts of appeals, Iowa is not following a minority position. The decision in State v. Tovar is consistent with the right to counsel as interpreted by the Third, Sixth, Eighth, Ninth, and Tenth Circuits. The Iowa Supreme Court's decision is also consistent with those States that have determined Faretta is applicable to guilty pleas, that defendants should be advised as to the usefulness of counsel, or that treat the waiver of counsel as either a separate inquiry from the inquiry for acceptance of the plea or treat it according to the particular stage of the proceedings. The Iowa Supreme Court's position is hardly an aberration and works to ensure an accused's waiver of counsel is voluntary, knowing, and intelligent. The Petition should be denied.

III.

The Decision of the Iowa Supreme Court is Consistent with Iowa's Interpretation of the Right to Counsel.

The Iowa Supreme Court's decision follows a long line of cases in which the Iowa Supreme Court has zealously protected the right to counsel. As early as 1907, the Iowa Supreme Court recognized that the Iowa Constitution guarantees criminal defendants the

assistance of counsel. Korf v. Jasper County, 108 N.W. 1031, 1032 (Iowa 1907). The right extended to all stages of the criminal proceeding. Id. at 1033.

Iowa's case law regarding the right to counsel developed little until State v. Cooper, in which the Iowa Supreme Court held that an uncounseled conviction could not be used as a basis for imposing incarceration upon a defendant or enhancing a charge against a defendant. State v. Cooper, 343 N.W.2d 485 (Iowa 1984). In forging its decision, the court relied, in part, upon Baldasar v. Illinois, 446 U.S. 222 (1980), and upon its own view of the importance of the right to counsel. Id. at 486.

During the last 20 years, the Iowa Supreme Court has taken a closer look at cases involving the right to counsel. Initially, the Iowa Supreme Court held that defendants may waive the right to counsel, and that the nature of the inquiry would vary with "the nature of the offense and the ability of the accused to understand the process." State v. Hindman, 441 N.W.2d 770, 772 (Iowa 1989). If the offense was one that could be readily understood by laypersons, then the inquiry only needed to assure "an awareness of the right to counsel and a willingness to proceed without counsel in the face of such awareness." Id.

In State v. Rater, the Iowa Supreme Court recognized that a defendant's request to proceed without counsel must be "'clear and unequivocal.'" State v. Rater, 568 N.W.2d 655, 658 (Iowa 1997)(quoting Faretta v. California, 422 U.S. 806, 835 (1975)). He must then "'knowingly and intelligently'" waive his right to counsel. Id. (same). The Court held that the trial court "must make the defendant 'aware of the dangers and

disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Id. (citations omitted).

More recently, the Iowa Supreme Court has taken a more deliberated approach to the waiver of counsel, addressing several cases in which it determined that the district courts' inquiries into waivers of counsel were not valid. In State v. Cooley, the Court reiterated the holding of Von Moltke that "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand" regarding a defendant's "apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." State v. Cooley, 608 N.W.2d 9, 15 (2000)(quoting Von Moltke v. Gillies, 332 U.S. 708, 724 (1948)). In particular, the Iowa Supreme Court stated that a waiver is made knowingly when the accused is apprised of the Von Moltke factors, "admonished as to the usefulness of an attorney at that particular proceeding, and made cognizant of the danger in continuing without counsel." Id. at 15. The Court reversed Cooley's conviction, holding that the inquiry by the district court failed to adequately inform him of the dangers of inherent in self-representation. Id. at 16.

In State v. Martin, the Iowa Supreme Court determined that Martin's waiver of the right to counsel was not done knowingly and intelligently. State v. Martin, 608 N.W.2d 445, 450 (Iowa 2000). The Court found that the district court did little more than advise Martin to keep his attorney. Id. The Court reiterated its earlier recommendation that

judges and attorneys look to the Bench Book for United States District Judges or the Iowa Bench Book for model inquiries. Id. (citing State v. Spencer, 519 N.W.2d 357, 360 n.1 (Iowa 1994)).

Finally, in State v. Stephenson, the Iowa Supreme Court reversed Stephenson's conviction when it determined the district court failed to conduct an adequate inquiry into his waiver of counsel. State v. Stephenson, 608 N.W.2d 778, 782-83 (Iowa 2000). The Court held that courts were "required to engage the accused in a colloquy sufficient to apprise a defendant of the dangers and disadvantages inherent in self-representation." Id. at 782. The Court noted the dual purpose of the colloquy: to protect the constitutional rights of the accused and to insulate the judiciary from claims of abuse by creating a formal record. Id.

Thus, in 2000, the Iowa Supreme Court reversed the convictions of three defendants because the district courts had failed to conduct adequate inquiries into the defendants' requests to waive counsel. The Court recognized the district courts' obligation to conduct an adequate on-the-record inquiry as "an absolute duty." Id.

It is not surprising, given the recent failure of Iowa district courts to conduct even minimally sufficient inquiries into waivers of counsel, that the Iowa Supreme Court used the Respondent's case to provide further guidance to the district courts on the basic elements needed for waivers of counsel at plea proceedings. The decision in State v. Tovar was not a "paternalistic gloss on the Sixth Amendment." (Petition at 23). It was instead a response to the repeated inadequacies the Iowa Supreme Court was finding in

criminal proceedings. It was a directive to the lower courts to adhere to State v. Cooley and Patterson v. Illinois in considering the particular proceeding when formulating their inquiries.

In fact, the Iowa Supreme Court would have been likely to find Respondent's waiver of counsel invalid without considering the suggestions it outlined in its opinion. The failure was not that Respondent was not advised that there may have been defenses available to him that he would be in danger of waiving if he proceeded to plead guilty without the assistance of counsel or that he would lose the opportunity to obtain an independent opinion on whether it was wise to plead guilty. (Petition App. at 18). Rather, the Iowa Supreme Court noted that "[n]ot only was there an absence of any dialogue concerning the value of having an attorney when pleading guilty, there was no colloquy with Tovar that alerted him to the dangers and disadvantages of entering a guilty plea without the advice of counsel." (Petition App. at 16). In other words, "the district court did not engage Tovar in any meaningful discussion concerning his waiver of counsel at the plea proceeding." (Petition App. at 18-19).

Having once again observed a court's failure to engage a defendant about the usefulness of counsel at the particular proceeding for which waiver was requested, the Iowa Supreme Court sought to remedy the problem by clarifying what sort of inquiry should be conducted. The Iowa Supreme Court's ruling is consistent with its understanding of the importance of the right to counsel and its prior case law. For these reasons, the Petition should be denied.

IV.

Contrary to Petitioner's Assertion, the Decision of the Iowa Supreme Court Will Not Have a Severe Adverse Impact

Petitioner asserts that the Iowa Supreme Court's decision will have a "broad and deep impact on Iowa law." (Petition at 11). Petitioner alleges the decision will: 1) inhibit the guilty plea process; 2) allow defendants to challenge any past guilty plea; and 3) prohibit prosecutors from charging enhanced offenses where the plea record is insufficient. (Petition at 11-12).

First, the decision of the Iowa Supreme Court will not inhibit the plea process. At most, it may take the plea court five more minutes to address a defendant and advise him of the usefulness of an attorney and the consequences of proceeding pro se, in addition to the colloquy already required for acceptance of the plea. This concern is further alleviated in misdemeanor cases, where the plea court may accept a written plea of guilty from a defendant pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b) (2003). (Petition at 3-4). If the waiver of counsel at the plea proceedings appears in the written plea form and waiver of rights, it will not take a significant amount of time for the court to review the plea and waiver form personally with a defendant.

Second, the decision of the Iowa Supreme Court will not create a tidal wave of defendants seeking to vacate their prior guilty pleas. Respondent recognizes that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Griffith v. Kentucky, 479 U.S.

314, 328 (1987); Morgan v. State, 469 N.W.2d 419, 422 (Iowa 1991). Thus, there will be guilty pleas pending on direct appeal to which the Tovar decision would be applicable.

Such new rules generally do not apply retroactively, however, to cases on collateral review. Teague v. Lane, 489 U.S. 288, 311-316 (1989); Morgan v. State, 469 N.W.2d at 422. A new rule will apply on collateral view if it (1) places certain types of individual conduct beyond the ability of legislators to proscribe or (2) creates a watershed rule of criminal procedure implicating fundamental trial fairness. Id. at 311-12; Morgan v. State, 469 N.W.2d at 422.

Respondent questions whether the Iowa Supreme Court established a new rule, given that the Iowa Supreme Court had previously recognized that the colloquy regarding the waiver of counsel was to be specifically tailored to the nature of the offense, the background of the accused, and the usefulness of counsel at the particular proceeding. See, e.g., State v. Cooley, 608 N.W.2d 9, 14-15 (Iowa 2000)(citing Patterson v. Illinois, 487 U.S. 285, 299 (1988)). Even if the Iowa Supreme Court's decision did create a new rule, Respondent asserts the rule would not qualify under either exception to the non-retroactivity rule of Teague. Thus, the Iowa Supreme Court's decision would not be retroactive to cases on collateral review, which would then greatly ease Petitioner's concerns regarding the effect of the decision.

Third, the decision of the Iowa Supreme Court will not create an undue burden for prosecutors. The "practical difficulty of obtaining aged transcripts and filings in otherwise settled convictions" is not as significant when the misdemeanor plea has been

entered via a written plea and waiver of rights pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b). (Petition at 4-5, 11). In these cases, the waivers will appear in the court record, which is easily accessible. Although there may be more difficulty in obtaining a transcript, it is not an impossibility. The transcript of Respondent's 1996 guilty plea and sentencing was, for example, made part of the record during his 2001 felony case. (Petition at 5-8).

Furthermore, any difficulty prosecutors might have in obtaining the record for previous convictions would apply regardless of whether this Court affirms or overrules the decision of the Iowa Supreme Court. The prosecution is required to show that a defendant either was represented by counsel or intelligently and voluntarily waived counsel before the defendant's prior conviction may be used to enhance a current offense. See Baldasar v. Illinois, 446 U.S. 222, 226 (1980) (holding a prior uncounseled misdemeanor conviction could not be used to enhance a later offense), overruled in part by Nichols v. United States, 511 U.S. 738, 749 (1994)(holding uncounseled convictions could be used for enhancement purposes as long as no incarceration was imposed in the earlier offense); State v. Cooper, 343 N.W.2d 485, 486 (Iowa 1984)(precluding use of uncounseled theft convictions to enhance later theft charge to an aggravated misdemeanor). Thus, even if this Court were to disapprove of the colloquy suggested by the Iowa Supreme Court, the prosecution would still have the obligation of obtaining the court record relating to previous convictions if it wanted to use those convictions for enhancement purposes.

Notably, Petitioner fails to mention that many of the enhancement offenses listed in the Petition specify a time frame under which a previous conviction would qualify for enhancement.[1] A previous conviction for domestic assault, for example, would not qualify to enhance a current offense if the previous conviction occurred more than six years prior to the current offense. Iowa Code § 708.2A(5)(a) (2003). A previous conviction for harassment would not qualify as an enhancing offense if it occurred more than 10 years prior to the current offense. Id. § 708.7(2)-(3). The Operating While Intoxicated chapter under which Respondent was convicted limits the enhancement timeline to previous OWI offenses occurring no more than 12 years prior to the current offense. Id. §§ 321J.2(4)(a), 321.12(4). With respect to these offenses, the risk that prosecutors would be unable to obtain "aged transcripts" is minimal. (Petition at 11).

It is also appropriate to discuss the burdens of proof with respect to the waiver issue as it relates to Petitioner's claim of "adverse impact." The State would have the burden of proof that an accused validly waived the right to counsel once an accused asserts the error. State v. Cooley, 608 N.W.2d 9, 14 (Iowa 2000). The burden shifts, however, on collateral review. In a postconviction proceeding, a defendant would have to establish the facts supporting an invalid waiver by a preponderance of the evidence.

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[1]. Respondent notes Petitioner misidentified the enhancement statute relating to sexual assault. The statute cited by Petitioner, Iowa Code section 709.11, relates to assault with intent to commit sexual abuse. Iowa Code § 709.11 (2003). The enhancement statute is located at sections 901A.1 and 901A.2. Id. §§ 901A.1-.2.

Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977). This also eases any potential hardship that might be placed on prosecutors.

Finally, the colloquy suggested by the Iowa Supreme Court would actually assist Petitioner in the long run. If all Iowa courts were to follow the colloquy at plea proceedings, there would be little question that a defendant was adequately advised and made aware of his right to counsel at the plea proceeding. If defendants proceed to plead guilty after being advised of the usefulness of counsel at the plea stage and the consequences of proceeding without counsel at the plea stage, then the presumption is that they elected to plead guilty with "eyes open." Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1943).

The Sixth Amendment was designed to protect an accused's rights to counsel and to a fair trial, not to ease the burden on prosecutors seeking convictions. See Powell v. Alabama, 287 U.S. 45, 61-64 (1932)(discussing the history of the right to counsel in England and the colonies, and quoting an historical treatise that found the English common law practice of denying counsel to felony defendants was an expedient means for convicting the accused). The Iowa Supreme Court's decision is consistent with the intent of the Sixth Amendment and will not create undue hardship in the prosecution of offenses. The Petition should be denied.

CONCLUSION

For all of the reasons discussed above, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF FILING

On the 7th day of July, 2003, I the undersigned, did file Respondent's Brief in Opposition with the Clerk of United States Supreme Court, by timely mailing, by First Class U.S. mail, pursuant to Supreme Court Rule 12(2) an original and ten (10) copies to said Clerk at the Supreme Court of the United States, One First Street, N.E., Washington DC 20543

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No. 02-1541

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In The

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

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SUMMARY OF REPLY ARGUMENT

That the State, Tovar, the majority and dissent of the Iowa Supreme Court employ the same U.S. Supreme Court precedent for their disparate positions underscores the need for granting the State's Petition for Certiorari. Current Supreme Court precedent does not resolve the issue here: what the Sixth Amendment requires for a valid waiver of counsel at the guilty plea stage.

The divergent treatment of this issue by the twenty seven jurisdictions which Tovar and the State discuss emphasizes the value of granting the Petition for Certiorari. Although Tovar and the State quarrel over the contours of this split, a substantial disagreement among the lower courts has developed over the last several decades.

Granting certiorari will ease the significant practical difficulties springing from the Iowa Supreme Court's decision, as well as those which emerge from a lack of uniformity among the states and federal circuits. Without direction from this Court, a plurality of states and federal circuits cannot honor settled convictions from the remaining jurisdictions for purposes of enhancing present offenses.

I. SUPREME COURT PRECEDENT DOES NOT DIRECTLY RESOLVE THE ISSUE IN DISPUTE.

The parties – and the courts below – refer to a discrete universe of Supreme Court precedent, including *United States v. Ruiz*, 536 U.S. 622 (2002); *Custis v. United States*, 511 U.S. 485 (1994); *Nichols v. United States*, 511 U.S. 738 (1994); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Faretta v. California*, 422 U.S. 806 (1974); *Argersinger v. Hamlin*,

407 U.S. 25 (1972); *Boyd v. Dutton*, 405 U.S. 1 (1972); *Brady v. United States*, 397 U.S. 742 (1970); *Von Moltke v. Gillies*, 332 U.S. 708 (1948).

Of these, only the *Von Moltke* plurality opinion addresses what the Sixth Amendment requires a court to discuss with a defendant pleading guilty *pro se*. 332 U.S. at 724. That case did not so much address waiver of counsel as a plea to a crime the defendant did not commit. *Von Moltke* involved prolonged deprivation of access to counsel, incorrect legal advice by FBI attorneys, long-term pre-trial incarceration, as well as a failure to explain the elements of the offense or the possibility the death penalty could be imposed. 332 U.S. at 711-21.

Much of *Von Moltke's* instruction is, however, already given to defendants in Iowa and elsewhere as part of the guilty plea colloquy which assures the court that a factual basis for the charge exists, that the defendant understands the nature of the offense and its elements, the range of possible punishments, the right to counsel, and the several other constitutional rights a defendant waives by pleading guilty. *See, e.g.,* Iowa R. Crim. P. 2.8(2)(b).

The remaining authorities discussed either peripherally underscore the importance of plea counsel, *Custis*, 511 U.S. at 494-95; *Brady*, 397 U.S. at 748, fn. 6, or they address waiver of counsel outside the plea context, *compare Patterson*, 487 U.S. at 298 (post-indictment questioning by police) *with Faretta*, 422 U.S. at 835-36 (assertion of right to self-representation at trial).

From these authorities, however, the parties, the majority and dissent at the Iowa Supreme Court, and the Iowa Court of Appeals have extracted thoughtful yet diametrically opposed conclusions.

If Tovar is correct that these authorities compel the result the narrow majority of the Iowa Supreme reached, then that teaching has escaped a significant number of federal and state jurisdictions. If the State is correct, on the other hand, that the law remains unsettled after *Von Moltke*, *Faretta*, and *Patterson*, among others, then the absence of direct precedent explains the disparate treatment of the issue among the lower courts.

Either position warrants Supreme Court review.

II. THE SPLIT AMONG LOWER COURTS HAS BECOME WELL-DEVELOPED AND WARRANTS SUPREME COURT REVIEW.

Although the State disputes Tovar's characterization of a majority rule, his brief acknowledges that a substantial disagreement among the lower courts has developed over the last several decades. For the record, however, eight of the authorities which Tovar cites do not necessarily conform to the rule he advances.

The Third Circuit, for example, equates the requirements for waiver of counsel with those for a voluntary and intelligent guilty plea itself. *United States ex rel. McDonald v. Commonwealth of Pennsylvania*, 343 F.2d 447, 451 (3rd Cir. 1965). *United States v. Solemo*, concerned with waiver of counsel at sentencing, does not detract from the *McDonald* rule. 61 F.3d 214, 219 (3rd Cir. 1995).

Tovar's reference to *Shafer v. Bowersox*, filed after the State's Petition here, raises the prospect of a split within the 8th Circuit. *Shafer* relies on the *Von Moltke* factors for a valid waiver of counsel at a guilty plea. *Shafer*, 329 F.3d 637, 648 (8th Cir. 2003). A three-judge panel reversed

Shafer's first-degree murder conviction noting the plea colloquy failed *Von Moltke* as well as *Faretta*. *Id.*

In *United States ex rel. Miner v. Erickson*, another three-judge panel also relied in part on *Von Moltke*, but reached a contrary result. *Miner*, 428 F.2d 623, 628 (8th Cir. 1970). There, the trial court gave similar advisories to the defendant: the nature of the charges, possible punishments, desirability of counsel, and entitlement to court appointed counsel. *Id.*

Finally, the State disputes Tovar's position that several of the state authorities conform to the Iowa Supreme Court's ruling. Rather they either assert the *Von Moltke* factors, *see Garnick v. Miller*, 403 P.2d 850, 853 (Nev. 1965); deal with a competency question under *Godinez v. Moran*, 509 U.S. 389 (1993), *State v. Pollard*, 657 A.2d 185, 189-90 (Vt. 1995); or enunciate a rule which complies with Iowa's rule for validly accepting a guilty plea, *see People v. Christensen*, 555 N.E.2d 422, 426 (Ill. Ct. App. 1990), *State v. Fulp*, 558 S.E.2d 156, 159-60 (N.C. 2002), *State v. Arguelles*, 63 P.3d 731, 750 (Utah 2003).

Tovar and the State discuss a combined total of twenty-seven jurisdictions. Some of these jurisdictions hold the same *Faretta* warnings which a defendant receives prior to trial apply when the defendant chooses to forego trial and enter a guilty plea *pro se*. *See, e.g., Swenson v. Municipality of Anchorage*, 616 P.2d 874, 878 fn. 5 (Alaska 1980); *Clary v. State*, 818 So.2d 686, 687 (Fla. Dist. Ct. App. 2002); *Shelton v. State*, 390 N.E.2d 1048, 1049 (Ind. Ct. App. 1979); *Watts v. State*, 556 S.E.2d 368, 370 (S.C. 2001).

Others jurisdictions say no, *Faretta* is inapplicable. *See, e.g., Stano v. Dugger*, 921 F.2d 1125, 1145 (11th Cir. 1991); *State v. Maxey*, 873 P.2d 150, 154 (Idaho 1994);

People v. Schneider, 429 N.W.2d 845 (Mich. Ct. App. 1988); *State v. Strain*, 585 So.2d 540, 544 (La. 1991); *State v. Cashman*, 491 N.W.2d 462, 465 (S.D. 1995); *Hatten v. State*, 71 S.W.3d 332, 334 (Tex. Ct. Crim. App. 2002).

Still more jurisdictions hold that defendants validly waive counsel when they know they are entitled to counsel, the elements of the offense, maximum and minimum possible punishments, subpoena powers, the right to confront witnesses, the right to testify, the right against self-incrimination, the terms of a plea agreement (if any) and the right to appeal. *See, e.g., In re Johnson*, 398 P.2d 420, 427 (Cal. 1965); *State v. Green*, 178 N.W.2d 271, 272-73 (Neb. 1970). Further discussion of the pitfalls of self-representation – particularly for lightly punished, simple crimes like operating while intoxicated – imposes an "idle and time-wasting ritual," *In re Johnson*, 398 P.2d at 427, particularly when this Court has recognized that

> the Constitution . . . does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.

Ruiz, 534 U.S. at 630.

Given the substantial disagreement among lower courts, this Court ought to grant the Petition for Certiorari.

III. POLICY CONSIDERATIONS SUGGEST THE IOWA SUPREME COURT'S COLLOQUY IS UNNECESSARILY BURDENSOME.

To be sure, the Sixth Amendment right to counsel is not a tool "to ease the burden on prosecutors seeking convictions." Respondent's Br. in Opposition 22. This position, however, misapprehends the State's purpose in seeking review. The issue here has received extensive, albeit inconsistent, treatment nationally. The present case offers an opportunity to advise Iowa and the other jurisdictions of the Sixth Amendment's requirement for a valid waiver of counsel at a guilty plea.

Effectively, the colloquy now required in Iowa improperly discourages defendants from pleading guilty without an attorney by implying that an independent source of legal advice may uncover a technical defense, such as a suppression issue. *See Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990) (noting the "thin line" courts must toe "[b]ecause self-representation necessarily entails the waiver of the Sixth Amendment right to counsel, a trial court can commit ... error by either improperly granting a request to proceed *pro se* – and thereby depriving the individual of this right to counsel – or by denying a proper assertion of the right to represent oneself, and thereby violating *Faretta*."); *State v. Tovar*, 656 N.W.2d 112 (Iowa 2003) (Carter, J., dissenting) (noting majority's speculation about "unidentified potential defenses that an able lawyer might have advanced").

Where a defendant, like Tovar, enters an otherwise knowing and intelligent guilty plea – knowing his guilt, the elements of the crime, the possible punishments and the full range of waived constitutional rights – the Iowa

Supreme Court's requirement of additional inquiry into factual or legal defenses creates an unnecessary burden.

Tovar notes the look-back provisions for enhancing OWI or harassment offenses. Obtaining records ten or twelve years old from the other ninety-eight Iowa counties or other forty-nine States is a significant undertaking, as this Court has recognized. *See Custis*, 511 U.S. at 496.

If the Sixth Amendment does not mandate the extensive cautionary advisory which the Iowa Supreme Court has imposed, then the administration of justice is needlessly frustrated, particularly since convictions from numerous other states are now effectively null for enhancement purposes in Iowa prosecutions.

CONCLUSION

For these reasons, the State respectfully asks that this Court grant the Petition for Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 02-1541

In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Iowa

JOINT APPENDIX

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3/22/00	Motion for Adjudication of Law Points, No. OWCR057355, seeking to bar use of Story County conviction OWCR023989 for enhancement purposes.
4/6/01	State's Response to Motion for Adjudication of Law Points
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5/25/01	Verdicts and Orders, No. OWCR057355, convicting Tovar of Operating While Intoxicated and Driving While Barred; setting sentencing.
9/28/01	Entry of Judgments, No. OWCR057355; On Count I sentencing Tovar to 180 day jail term, all but 30 days suspended, $2500 fine plus surcharges; On Count II sentencing Tovar to 30 days jail, credit for time served, to run concurrent with Count I, $500 suspended fine.
10/01/01	Notice of Appeal, No. OWCR057355

6/19/02 Decision of Iowa Court of Appeals, No. 2-330/01-1558, AFFIRMED judgment and sentence of Johnson County District Court.

9/20/02 Supreme Court Order, No. 01-1558, Johnson County No. OWCR057355, granting further review, no supplemental briefs, no oral argument.

1/23/03 Decision of Iowa Supreme Court, No. 168/01-1558, DECISION OF COURT OF APPEALS VACATED; JUDGMENT OF DISTRICT COURT REVERSED AND CASE REMANDED. Remand for entry of judgment without consideration of defendant's prior OWI conviction.

2/13/03 *Procedendo*, No. -01-1558, Johnson County No. OWCR057355

MOTION FOR ADJUDICATION OF LAW POINTS

(Filed March 22, 2001)

IN THE IOWA DISTRICT COURT IN
AND FOR JOHNSON COUNTY

STATE OF IOWA, Plaintiff, vs. FELIPE TOVAR, Defendant.	)))))))	No. OWCR057355 MOTION FOR ADJUDICATION OF LAW POINTS

COMES NOW the defendant through counsel, pursuant to Iowa Rule of Civil Procedure 105 and Iowa Rule of Criminal Procedure 10, and states the following to the Court:

1. In Count I of the Trial Information the defendant is charged with the crime of Operating While Under the Influence, Third Offense, for an incident occurring on December 7, 2000. The State relies on Story County case number OWCR023989 as one of two prior OWI convictions to enhance Count I in the instant case to a third offense under Iowa Code section 321J.2.

2. Story County case number OWCR023989 may not be used for enhancement purposes, because in OWCR023989, the defendant neither was represented by counsel nor made a full knowing, intelligent, and voluntary waiver of counsel. *See* Iowa Rule of Criminal Procedure 18(9).

3. The State has the burden of proving the validity of any waiver of right to counsel. *State v. Rater*, 568 N.W.2d 655, 660 (Iowa 1997).

4. Waiver of the Sixth Amendment right to counsel is invalid unless the court makes the defendant aware of the dangers and disadvantages of self-representation, so that the record will establish he knows what he is doing and his choice is made with eyes open. *State v. Rater*, 568 N.W.2d 655, 658 (Iowa 1997); *State v. Wiese,* 587 N.W.2d 488, 490 (Iowa App. 1998).

5. Waiver of Sixth Amendment right to counsel cannot be presumed from a silent record. *State v. White*, 587 N.W.2d 240, 242 (Iowa 1998). The record must show that an accused was offered counsel but intelligently and understandingly rejected the offer. Id. anything less is not waiver. *Id.* A trial court has an absolute duty to indulge the accused in an on the record colloquy. *State v. Stephenson*, 608 N.W.2d 778, 783 (Iowa 2000). Harmless error analysis is not applicable to a Sixth Amendment right to self-representation question. *State v. Cooley*, 608 N.W.2d 9, 17 (Iowa 2000). Harmless error analysis cannot be utilized as a curative measure, regardless of whether prejudice results from the trial court's error. *Id.* at 18.

6. The defendant was never made aware by the court in OWCR023989 of the dangers and disadvantages of self-representation; therefore, because there was no valid waiver of counsel in Story County case number OWCR023989, that case may not be used for enhancement purposes in the instant case.

WHEREFORE the defendant requests that the court set a hearing on this motion, and that at the conclusion of said hearing, the court adjudicate as a matter of law that

Story County case number OWCR 023989 may not be used for enhancement purposes in Count I of Johnson County case number OWCR057355.

Dated this 22nd day of March, 2001.

/s/ Emily Hughes
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cc: County Attorney

EXHIBIT [A]

IOWA DISTRICT COURT FOR STORY COUNTY

STATE OF IOWA, Plaintiff, v. JON ROBERT LAKE, JASON EVANS, FELIPE TOVAR, JAMES THOMAS BLOME and JEREMIAH KEARNEY, Defendants.	:	Case Nos. SRCR023955, SRCR023980, OWCR023989, OWCR023988, OWC4R023956 TRANSCRIPT OF PROCEEDINGS (Filed Apr. 6, 2001)

The above-entitled matters came on for hearing before the Honorable Steven P. Van Marel commencing at 1:30 p.m. on Monday, November 18, 1996, at the District Associate Court, Story County Courthouse, Nevada, Iowa.

APPEARANCES

MARY RICHARDS, Story County Attorney, Story County Courthouse, Nevada, Iowa, appearing on behalf of the State.

Jon Robert Lake, Jason Evans, Felipe Tovar, James Thomas Blome and Jeremiah Kearney, appeared personally without counsel.

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[3] PROCEEDINGS

(Hearing commenced at 1:32 p.m., on Monday, November 18, 1998, with the Court, counsel, and defendants present in the courtroom)

THE COURT: We are on the record now in the state of Iowa versus Jon Lake, Case No. 23955. This is the time and place set for arraignment on a trial information charging the defendant with driving under suspension. Mr. Lake appears solely without counsel. Mr. Lake, I see that you are appearing here today without having an attorney present and you did not apply for a court appointed attorney. Did you want to represent yourself at today's hearing?

DEFENDANT LAKE: Yes.

THE COURT: Mr. Lake, have you received your information and the minutes of testimony?

DEFENDANT LAKE: Yes, I have.

THE COURT: And are you charged in your true correct name?

DEFENDANT LAKE: Yes.

THE COURT: And did you want me to read that information to you or did you want to waive the reading?

DEFENDANT LAKE: I will waive it.

THE COURT: And how did you wish to plead?

DEFENDANT LAKE: Guilty.

THE COURT: All right. I will get back to you [4] in just a moment, Mr. Lake.

We are also on the record in the State of Iowa versus Jason Evans, Case No. 23980. This is the time and place set for arraignment on a trial information charging the defendant with possession of marijuana. Mr. Evans, I note that you appear without having an attorney present and you waived application for an appointed attorney. Did you want to represent yourself at today's hearing?

DEFENDANT EVANS: Yes, sir.

THE COURT: Have you received your trial information and the minutes of testimony?

DEFENDANT EVANS: Yes, sir, I have.

THE COURT: And are you charged in your true and correct name?

DEFENDANT EVANS: Yes.

THE COURT: And did you want me to read that trial information to you or did you want to waive the reading?

DEFENDANT EVANS: Waive the reading.

THE COURT: And how did you wish to plead?

DEFENDANT EVANS: Guilty.

THE COURT: I will get back to you in just a moment.

We are on the record in the State of Iowa versus Felipe Tovar, Case No. 23989. This is the time and place set for arraignment on a trial information charging the defendant [5] with operating while intoxicated. Mr. Tovar appears without counsel and I see, Mr. Tovar, that you

waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?

DEFENDANT TOVAR: Yes, sir.

THE COURT: And are you charged in your true and correct name?

DEFENDANT TOVAR: Yes, sir.

THE COURT: And did you want me to read that information to you or did you want to waive the reading?

DEFENDANT TOVAR: Waive the reading.

THE COURT: And how did you wish to plead?

DEFENDANT TOVAR: Guilty.

THE COURT: I will get back to you in just a moment.

We are on the record in the State of Iowa versus James Blome, Case No. 23988. This is the time and place set for arraignment on a trial information charging the defendant with operating while intoxicated. Mr. Blome, I note that you appear here today without having an attorney and you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?

DEFENDANT BLOME: Yes, sir.

THE COURT: Have your received your trial information and the minutes of testimony?

[6] DEFENDANT BLOME: Yes, sir.

THE COURT: Are you charged in your true and correct name?

DEFENDANT BLOME: Yes.

THE COURT: And did you want me to read the information to you or did you want to waive the reading?

DEFENDANT BLOME: Waive it.

THE COURT: How do you wish to plead?

DEFENDANT BLOME: Guilty.

THE COURT: I will get back to you in just a moment.

Then we are on the record in the State of Iowa versus Jeremiah Kearney, Case No. 23956. This is the time and place set for arraignment on a trial information charging the defendant with operating while intoxicated and possession of marijuana. Mr. Kearney, you appear here without counsel and I see you did not apply for a court appointed attorney. Did you want to represent yourself?

DEFENDANT KEARNEY: Yes.

THE COURT: And have you received your trial information and the minutes of testimony?

DEFENDANT KEARNEY: Yes.

THE COURT: Are you charged in your true and correct name?

DEFENDANT KEARNEY: Yes.

[7] THE COURT: And did you want me to read the information to you or did you want to waive the reading?

DEFENDANT KEARNEY: I want to waive it.

THE COURT: How did you wish to plead?

DEFENDANT KEARNEY: Guilty.

THE COURT: Gentlemen, it would be my suggestion that I do your five guilty pleas at the same time. That just saves me from having to do five basically identical hearings, one right after another. If I do your hearings at the same time, I would, of course, be making independent determinations about whether or not to accept your guilty pleas and independent determinations about what your sentences should be.

Mr. Lake, do you have any objection if we proceed in that fashion?

DEFENDANT LAKE: No, sir.

THE COURT: Mr. Evans, do you?

DEFENDANT EVANS: No.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: No, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: No, sir.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: No, sir.

THE COURT: Mr. Lake, how old are you?

[8] DEFENDANT LAKE: I am twenty-nine.

THE COURT: And what's the extent of your education?

DEFENDANT LAKE: I graduated high school.

THE COURT: So you obviously read and write the English language?

DEFENDANT LAKE: Yes, sir.

THE COURT: Are you currently under the influence of any kind of a drug or alcoholic beverage?

DEFENDANT LAKE: No.

THE COURT: Mr. Evans, your age?

DEFENDANT EVANS: Eighteen.

THE COURT: And your education?

DEFENDANT EVANS: G.E.D.

THE COURT: So you, of course, read and write?

DEFENDANT EVANS: Yes.

THE COURT: And are you currently under any kind of influence of a drug or alcoholic beverage?

DEFENDANT EVANS: No, sir.

THE COURT: Mr. Tovar, your age?

DEFENDANT TOVAR: Twenty-one.

THE COURT: Your education?

DEFENDANT TOVAR: Currently in college.

THE COURT: So you, of course, read and write the English language?

[9] DEFENDANT TOVAR: Yes.

THE COURT: Are you under the influence of any kind of a drug or alcoholic beverage?

DEFENDANT TOVAR: No, sir.

THE COURT: Mr. Blome, your age?

DEFENDANT BLOME: Twenty-four.

THE COURT; And your education?

DEFENDANT BLOME: Associates degree.

THE COURT: So you, of course, read and write?

DEFENDANT BLOME. Yes.

THE COURT: And are you under the influence of any kind of a drug or alcoholic beverage?

DEFENDANT BLOME: No, I am not.

THE COURT: Mr. Kearney, your age?

DEFENDANT KEARNEY: Twenty-one.

THE COURT: And your education?

DEFENDANT KEARNEY: Eleventh.

THE COURT: So you, of course, read and write?

DEFENDANT KEARNEY: Yes.

THE COURT: And are you under the influence of a drug or alcoholic beverage?

DEFENDANT KEARNEY: No.

THE COURT: Mr. Lake, has anyone promised you anything or threatened you in any way in order to convince you to enter this plea of guilty?

[10] DEFENDANT LAKE: No.

THE COURT: Have they you, Mr. Evans?

DEFENDANT EVANS: No.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: No, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Nope.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: No.

THE COURT: Gentlemen, before I can accept your pleas of guilty, I need to take some time this afternoon and explain to you what your rights are, make sure you understand those rights, and make sure you understand what rights you will be giving up by pleading guilty. If at any time during these proceedings you do not understand something, please feel free to interrupt me and tell me that and I will be happy to explain to you what it is you did not understand. Also, if at any time during these proceedings you change your mind and you decide you no longer want to plead guilty, just tell me that, I will stop the proceedings in your case and anything that you might have said up to that point in time could not be used against you at your trial.

THE COURT: Mr. Lake, are you currently on parole or probation?

DEFENDANT LAKE: No, sir.

THE COURT: Are you Mr. Evans?

[11] DEFENDANT EVANS: No, sir.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: No.

THE COURT: Mr. Blome?

DEFENDANT BLOME: No, sir.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: No.

THE COURT: Al [sic] right. Gentlemen, if you continue with this desire to plead guilty, there are certain rights that each one of you will be giving up and I now will explain those rights to you. First of all, if you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a trial of any kind on your charge.

Do you understand that, Mr. Lake?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: If you would enter a plea of not [12] guilty, not only would you have the right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf. But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial.

Do you understand that, Mr. Lake?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: If you enter a plea of not guilty, you would have a privilege against self-incrimination, which means you could not be forced to testify at your trial. And, if you elected not to testify, that election could not be used against you in any way. The county attorney's office would not be allowed to make any comments to the jury about your decision [13] not to testify. But, if you plead guilty, you give up that right to remain silent and

you will be required to admit your guilt here in the courtroom today.

Do you understand that, Mr. Lake?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Yes.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: And Mr. Kearney?

DEFENDANT KEARNEY: Yes.

THE COURT: If you enter a plea of not guilty, you would be presumed innocent until the State, if ever, proved you guilty beyond a reasonable doubt. But, if you plead guilty, you give up that presumption that you are innocent and by the admissions that you make in court today, you will be proving your guilt beyond a reasonable doubt.

Do you understand that, Mr. Lake?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

[14] THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: If you enter a plea of not guilty, the witnesses whose names appear in the minutes of testimony would be required to appear and testify in front of you and your attorney at trial and be subject to cross-examination by your attorney. But, if you plead guilty, those witnesses will never appear in court to testify in your case.

Do you understand that, Mr. Lake?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: If you enter a plea of not guilty, you would have a right to subpoena witnesses, and that

means that you could force witnesses to appear and testify for you. But, if you plead guilty, you give up that right.

Do you understand that, Mr. Lake?

[15] DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: Yes.

THE COURT: Gentlemen, those are the rights that you will be giving up if you plead guilty. Knowing that, did you still wish to plead guilty?

Mr. Lake?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: Mr. Lake, you have been charged with driving under suspension. That charge carries a maximum penalty of up to a year in jail and up to a $1500.00 fine and a [16] mandatory minimum fine of $250.00. Do you understand that?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans, you have been charged with possession of marijuana. That charge carries a maximum penalty of up to six months in jail and up to a $1,000.00 fine and a mandatory minimum fine of $100.00 Do you understand that?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar and Mr. Blome, you have been charged with operating while intoxicated. That charge carries a maximum penalty of up to a year in jail and up to a $1,000.00 fine and the mandatory minimum fine of two days in jail and a $500.00 fine. Do you understand that, Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Kearney, you have been charged with operating while intoxicated and possession of a controlled substance. Those – So the operating while intoxicated charge carries a maximum penalty of up to a year in jail and up to a $1,000.00 fine and a mandatory

minimum penalty of two days in jail and a $500.00 fine. Do you understand that?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: The charge of possession of a controlled substance carries a maximum penalty of up to six [17] months in jail and up to a $1,000.00 fine and a mandatory minimum fine of $100.00. Do you understand that?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: Gentlemen, I want you to understand that no matter what you ask for at the time of sentence and no matter what the State recommends, your sentencing is up to me and I can impose any penalty from the mandatory minimum on up to the maximum sentence.

Do you understand that, Mr. Lake?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Blome?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: Yes, sir.

THE COURT: And Mr. Kearney?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: Before I can accept your pleas of guilty, I need to be satisfied that you are in fact guilty of

the offense you are pleading guilty to. And, I do that by satisfying myself that you have committed the elements of the offense and I need to spend a little bit of time now with each of you individually and explain to you what the elements are and determine whether or not you committed those elements.

[18] Mr. Lake, the charge of driving under suspension just has two elements. The first element in your case would be that on October 24 of this year you operated a motor vehicle on a public street or highway in Iowa. The second element of the offense is that when you were driving your driving privileges were under suspension. Now, Mr. Lake, on October 24th of 1996 did you operate a motor vehicle on a public street or highway in the State of Iowa?

DEFENDANT LAKE: Yes, sir.

THE COURT: It looks like you were driving on Highway 69 in Huxley?

DEFENDANT LAKE: Yes, sir.

THE COURT: And at the time you were driving, were your privileges to drive under suspension?

DEFENDANT LAKE: Yes, they were.

THE COURT: Mr. Evans, you have been charged with possession of a controlled substance, which has three elements. In your case, the first element would be that on October 29, 1996, you had in your possession marijuana. The second element of the offense would be that you knew you had marijuana. And, the third element of the offense is that you knew what you had was

marijuana. Mr. Evans, on October 29th of this year, did you have in your possession marijuana?

DEFENDANT EVANS: Yes, sir, I did.

THE COURT: Did you know that you had it with [19] you?

DEFENDANT EVANS: Yes, sir.

THE COURT: And did you know it was marijuana?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar, Mr. Blome and Mr. Kearney, all three of you have been charged with operating while intoxicated. That charge just has two elements to the offense. The first element is that on the date listed on the trial information you were operating a motor vehicle in the State of Iowa. The second element of the offense is that when you did so, you were intoxicated. Now, under the law of the State of Iowa, there are two definitions of intoxication and you may fit one or both of those definitions. One way to be intoxicated is to have had a blood or breath alcohol concentration of .10 percent or more in your body at the time you were driving. The other way to be intoxicated is to be under the influence of alcohol, which means that the consumption of alcohol has affected your judgment on your reasoning or your faculties or it has caused you to lose control in any manner or to any degree of the actions or motions of your body.

Mr. Tovar, on November 2nd of this year, did you operate a motor vehicle in the State of Iowa?

DEFENDANT TOVAR: Yes.

THE COURT: It looks like you were driving on Lincolnway in the City of Ames?

[20] DEFENDANT TOVAR: Yes, sir.

THE COURT: Before you got in your car and drove it that night, had you been consuming alcohol?

DEFENDANT TOVAR: Yes, sir.

THE COURT: The minutes of testimony here indicate that you took an intoxilyzer test that showed you had a blood alcohol level of .194. Do you have any disagreement with that test result?

DEFENDANT TOVAR: No, sir.

THE COURT: Did you feel the effects of the alcohol that night either when you were driving or perhaps when you took the field sobriety tests?

DEFENDANT TOVAR: No, sir.

THE COURT: You didn't – The alcohol had no impact on you at all?

DEFENDANT TOVAR: I didn't think so.

THE COURT: Okay. But you do agree with the result of the intoxilyzer test?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome, On November 2nd of this year, did you operate a motor vehicle in the State of Iowa?

DEFENDANT BLOME: Yes, sir.

THE COURT: It looks like you were also driving on Lincolnway in the City of Ames?

DEFENDANT BLOME: Yes.

[21] THE COURT: Before you got in your car and drove it that night, had you been consuming alcohol?

DEFENDANT BLOME: Yes, sir.

THE COURT: And it looks like you took an intoxilyzer test that showed you had a blood alcohol level of .137. Do you have any disagreement with that test result?

DEFENDANT BLOME: No, I don't.

The COURT: Could you feel the effects of the alcohol?

DEFENDANT BLOME: Yes, sir.

THE COURT: And how did the alcohol affect you?

DEFENDANT BLOME: It gave me a buzz, I guess.

THE COURT: Did it effect your physically, impact on your balance or coordination?

DEFENDANT BLOME: No.

THE COURT: Think it affected your judgment or your reasoning?

DEFENDANT BLOME: No.

THE COURT: Okay. But you could feel the effects somewhat?

DEFENDANT BLOME: Yes.

THE COURT: Okay. And you don't have any disagreement with the breath test?

DEFENDANT BLOME: No, sir.

[22] THE COURT: Mr. Kearney, on October 26 of this year, did you operate a motor vehicle in the State of Iowa?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: And it looks like you were in Story County on county road E57; is that right?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: Had you been consuming alcohol before you drove that night?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: And according to the minutes of testimony you took an intoxilyzer test that showed you had a blood alcohol level of .151. Do you have any disagreement with that test result?

DEFENDANT KEARNEY: No, sir.

THE COURT: Could you feel the effects of the alcohol?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: How did the alcohol affect you?

DEFENDANT KEARNEY: I was drunk.

THE COURT: Pardon me?

DEFENDANT KEARNEY: I was drunk.

THE COURT: Could you feel the alcohol physically affect you?

DEFENDANT KEARNEY: Yes.

THE COURT: It had some impact on your [23] balance, coordination?

DEFENDANT KEARNEY: Right.

THE COURT: Is that yes?

DEFENDANT KEARNEY: Yes.

THE COURT: Then you have also been charged with possession of a controlled substance. So, Mr. Kearney, on that night, did you have in your possession marijuana?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: Did you know that you had the marijuana with you?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: And did you know it was marijuana?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: Okay. Mr. Lake, for the last time, did you still wish to enter your plea of guilty?

DEFENDANT LAKE: Yes, sir.

THE COURT: Mr. Evans, did you?

DEFENDANT EVANS: Yes, sir.

THE COURT: Mr. Tovar, did you?

DEFENDANT TOVAR: Yes, sir.

THE COURT: Mr. Blome, did you?

DEFENDANT BLOME: Yes, sir.

THE COURT: Mr. Kearney, did you?

DEFENDANT KEARNEY: Yes, sir.

THE COURT: Ms. Richards do you know of any [24] legal cause why I should not accept the pleas of guilty?

MS. RICHARDS: No, Your Honor.

THE COURT: Mr. Lake, Mr. Evans, Mr. Tovar, Mr. Blome, Mr. Kearney, I find that each one of you has entered your plea of guilty – your pleas of guilty voluntarily, with a full understanding of your rights, with a full understanding of the consequences of your pleas. I find a factual basis for your pleas and I do accept each one of your pleas of guilty.

Now that I have accepted your guilty pleas, each one of you has another right that I want to tell you about. And, that is your right to file a motion in arrest of judgment. A motion in arrest of judgment is a motion that you must file if you want to challenge or attack the validity of your plea of guilty. If you think your plea of guilty is defective and that I should not have accepted it, or if you want to attempt to withdraw your plea of guilty for whatever reason, you have to do that by filing a motion in arrest of judgment. And, in order for that motion to be effective, you have to file it at least five days before you are sentenced. Now, each one of you has a right to wait at least fifteen

days from today before you are to be sentenced. If you want to, you may waive that additional fifteen day waiting period and you may proceed to sentencing today. If you proceed to sentencing today, you are giving up your right to file a motion in arrest of judgment because you simply would not have time to file that motion before I sentence [25] you. What that means is that you are then giving up forever your ability to challenge your guilty plea. You are stuck with your guilty plea forever if you are sentenced today. And, the only thing you could ever appeal after today would be the sentence. You could not appeal your guilty plea. Also, if you proceed to sentencing today and you have to serve some jail time, you do not have to report to jail immediately today. I will let you decide when you want to report. And, if you are given a fine, I will give you time to pay your fine.

And, Mr. Lake, did you want to do sentencing at a later date or today.

DEFENDANT LAKE: I would like to do it today.

THE COURT: Mr. Evans?

DEFENDANT EVANS: Today, please.

THE COURT: Mr. Tovar?

DEFENDANT TOVAR: At a later date.

THE COURT: Okay. Mr. Blome?

DEFENDANT BLOME: Later date.

THE COURT: Mr. Kearney?

DEFENDANT KEARNEY: Today.

THE COURT: Ms. Weuve, would you get the calendar and we will set sentencing. All right. Mr. Tovar, how about if we set your sentencing for December 9th at 9:00 o'clock?

DEFENDANT TOVAR: That's fine.

[26] THE COURT: And Mr. Blome, we will set your sentencing for December 9th at 9:15, right after Mr. Tovar's. Will that work out okay?

MR. BLOME: That's fine. We will get orders out setting sentencing for December 9th at 9:00 and 9:15, respectively, We will send you those orders in the mail. You are free to go.

* * *

(At which time Defendants Tovar and Blome were excused from the Courtroom and the following record was made.)

* * *

THE COURT: We will start sentencing then with Mr. Lake. Ms. Richards, is there any evidence by the State?

MR. RICHARDS: Yes, Your Honor. Your Honor, State's Exhibit 1 is a copy of the defendant's driving record. State's Exhibit 2 is a copy of the defendant's criminal record. I just wrote '95.

THE COURT: Mr. Lake, any objection to Exhibit 1 or 2?

DEFENDANT LAKE: No, sir.

THE COURT: Exhibits 1 and 2 are admitted. Mr. Lake, did you have any evidence that you wanted to submit?

DEFENDANT LAKE: No, sir.

THE COURT: Ms. Richards, is there a recommendation by the State?

[27] MS. RICHARDS: Your Honor, the defendant has had a number of charges of driving while suspended, denied, canceled or revoked. I see here that there are, one, two, three, four, five of them, and since November of 1992, and suspended for a variety of different reasons. Under the circumstances, I think it would be appropriate if the judge would impose a jail sentence, whatever sentence the judge finds appropriate.

THE COURT: Thank you. Mr. Lake, before I impose your sentence, you have a right to make a statement. If there is anything you want to tell me about yourself, about this offense, or any kind of a sentence that you want to ask for, this is your opportunity to do so.

DEFENDANT LAKE: Well, I am guilty of driving. There was no excuse. I drove to Caseys to get a pop. It was raining. I didn't walk. My wife generally drives me everywhere I go. She was asleep that evening with the baby, so she couldn't leave. I do have a bad driving record. But, I don't make it a habit to drive unless I absolutely have to. Like in the past, Caseys. That's all I got to say.

THE COURT: Well, Mr. Lake, as I impose your sentence here today, there are two things I hope the sentence will accomplish: your rehabilitation and protection for our community. To say you have a bad driving record, Mr. Lake, is to put things mildly. You have a

terrible driving record. At least five prior driving under suspensions. I see the last [28] time, back in '95, you got ten days in jail and still here you are on another charge of driving under suspension. Some day, Mr. Lake, you have to learn that when the State says you are under suspension, you can't drive, and it makes no difference how important you think you [sic] mission is, you cannot get in a car and drive unless – I don't know – unless it is a case of a life or death situation and that rarely occurs. It doesn't matter if you have to go to work or if you have to go do – run some errands. It just makes no difference, Mr. Lake. You cannot drive and if you do and if you get caught, there are going to be serious consequences. Mr. Lake, in this case I am going to once again impose a ten day jail sentence. The last time you got ten days in jail was about a year and a half ago. So, maybe if you get another ten days now you will finally learn that you cannot do this. And, Mr. Lake, there are people right now upstairs in this building spending a year in jail on driving under suspension charges because they kept doing it. The sentences kept getting more severe until finally they got a year. That's a huge waste of a year to sit in jail because you couldn't stay out of a car and that's where you are headed, Mr. Lake, unless you make a decision to stop driving.

So, Mr. Lake, it is the order of this Court that you are adjudged guilty of driving under suspension, in violation of Section 321.210A of the Iowa Code.

You are sentenced to serve ten days in the Story [29] County Jail with credit for any time served. You are ordered to pay a $250.00 fine, a 30% surcharge and costs. You shall contact the Story County Sheriff's Office no later than November 30, 1996, in order to make arrangements to serve your jail sentence, which shall be served by

January 15, 1997. You are given ninety days in which to pay the fine, surcharge and costs.

Judgment having been imposed here, Mr. Lake, you do have a right to appeal the sentence. If you want to appeal, you must file a notice of appeal with the Clerk within thirty days. If you cannot afford the costs of appeal, those will be provided for you at the public expense, including the services of an attorney and the preparation of a transcript. Bond on appeal will be $650.00

Mr. Lake, what you need to do is by the end of the month is go up and talk to the sheriff's office and come up with a time when you can serve your ten days.

DEFENDANT LAKE: Do I need to go up there personally?

THE COURT: You can call them up personally. You have to serve your ten days all at once. You can't break it up on the weekends. It will be a straight ten day sentence. So, you need to make those arrangements with the sheriff's office. You need to go up to the Clerk's office and find out how much you owe and you got ninety days to get that paid. Do you have any questions about your sentence?

[30] DEFENDANT LAKE: No, sir.

THE COURT: Okay. You are free to go.

* * *

(At which time Defendant Lake was excused from the Courtroom and the following record was made.)

* * *

THE COURT: Ms. Richards, any evidence for Mr. Evans?

MS. RICHARDS: No, Your Honor. The State has sent for both criminal and driving record with regard to Mr. Evans and neither has been received.

THE COURT: Okay. Mr. Evans, did you have any evidence to submit?

DEFENDANT EVANS: No.

THE COURT: Recommendation by the State.

MS. RICHARDS: Your Honor, in this instance, I would recommend the mandatory minimum fine.

THE COURT: Mr. Evans, did you wish to make a statement before I impose your sentence?

DEFENDANT EVANS: No, sir.

THE COURT: Mr. Evans, you apparently don't have a prior criminal record and given your age, I think that imposition of a $250.00 fine is appropriate. I think that should be enough of a penalty to make you understand that when the State of Iowa says you cannot possess marijuana, you cannot [31] possess marijuana. And if you do and you get caught, there are going to be serious consequences. Mr. Evans, you might think that possession of marijuana is no big deal. It is an offense that doesn't hurt anyone. First of all, those things aren't true. And, even if they were true, it doesn't make any difference. The point is that the State legislature has determined possession of marijuana is unlawful. And it is your responsibility to follow the law. And if you don't, there can be consequences. And, I think that this should be enough of a

penalty and enough of a consequence to make you understand you need to do a better job exercising your responsibility.

So, Mr. Evans, it is the order of this Court that you are adjudged guilty of possession of marijuana, in violation of Section 124.401(3) of the Iowa Code.

You are sentenced to pay a $250,00 fine, a 30% surcharge and costs.

Judgment having been imposed, you do have a right to appeal. You must file a written notice of appeal with the Clerk within thirty days. And if you cannot afford the costs of appeal, those will be provided for you at the public expense, including the services of an attorney and the preparation of a transcript. Bond on appeal will be $650.00.

Mr. Evans, with the fine, 30% surcharge and costs, you will owe about $400.00. How much time do you think you will need to get that paid?

[32] DEFENDANT EVANS: A while. I don't – How much time can I have?

THE COURT: Well, 90 days, 120 days.

DEFENDANT EVANS: Probably 120 days.

THE COURT: I will give you 120 days to pay this. You should go up to the Clerk's office before you leave today and the Clerk will tell you exactly how much you owe and then they will tell you how you can send in your payments.

DEFENDANT EVANS: All right.

THE COURT: You are free to go.

* * *

(At which time Defendant Evans was excused from the Courtroom and the following record was made.)

* * *

THE COURT: Ms. Richards, evidence for Mr. Kearney.

MS. RICHARDS: State's Exhibit 1 is a copy of Mr. Kearney's driving record, Your Honor.

THE COURT: Mr. Kearney, any objection?

DEFENDANT KEARNEY: No.

THE COURT: Exhibit 1 is admitted.

MS. RICHARDS: Your Honor, there is no criminal record available.

THE COURT: Mr. Kearney, did you have any evidence to submit?

[33] DEFENDANT KEARNEY: No, sir.

THE COURT: Ms. Richards, the State's recommendation.

MS. RICHARDS: Your Honor, Mr. Kearney has a minimal driving record prior to this time. The last time anything appears on his record was a speeding ticket, an accident involvement in 1992. And that is the only thing that appears on his record. He has no criminal record. Under the circumstances, I would recommend the mandatory minimum two days in jail, a $500.00 fine, plus

surcharge on the O.W.I., and the mandatory minimum fine for the possession of marijuana.

THE COURT: Mr. Kearney, did you wish to make a statement before I impose your sentence?

DEFENDANT KEARNEY: No, sir.

THE COURT: Mr. Kearney, as I impose your sentence or sentences, there are two things I hope they will accomplish: your rehabilitation and protection for our community from further offenses from you. And, I think generally what they need to do is to impress upon you how important it is that you exercise your responsibilities as a member of our community. Mr. Kearney, when you operated your vehicle, when you were intoxicated, you placed not only yourself, but more importantly, you placed innocent members of our community at risk of death or serous injury. You could have easily been involved in a serious accident and killed [34] somebody's child or destroyed a family. And, you just do not have the right to create those kinds of risks. On the possession charge, I can make you understand that it is your responsibility to follow the laws of the State of Iowa. And, if you don't, there can be serious consequences. Mr. Kearney, I will impose the mandatory minimum sentence, which on the O.W.I. charge is two days in jail and a $500.00 fine. And, on the possession charge, I will impose a $250.00 fine. I think those should be a severe enough penalty to make you understand that you do have to do a better job exercising your responsibilities.

So, Mr. Kearney, you are adjudged guilty of operating while intoxicated, in violation of Section 321J.2 of the Iowa Code.

You are sentenced to serve two days in the Story County Jail with credit for time served. And, you are ordered to pay a $500.00 fine, a 30% surcharge and costs. You shall contact the Story County Sheriff's Office no later than November 30, 1996, in order to make arrangements to serve your jail sentence, and you shall have your sentence completed by January 15, 1997.

You are also adjudged guilty of possession of a controlled substance in violation of Section 124.401(3) of the Iowa Code.

You are ordered to pay a $250.00 fine, a 30% surcharge and costs. You shall pay the fines, surcharges and costs within [35] the next 180 days.

Judgment having been imposed, Mr. Kearney, you do have a right to appeal both sentences. If you want to appeal, you must file a written notice of appeal with the Clerk within thirty days and if you cannot afford the costs of appeal, those will be provided for you at the public expense including the services of an attorney and the preparation of a transcript. Bond on appeal will be $650.00 on each charge.

Mr. Kearney, you need to check with the sheriff's office before the end of the month and make arrangements to come in and serve your two days. And then you need to check with the Clerk's office and the Clerk will tell you how much you owe on these two matters and they will – I have given you six months to get those matters paid. Okay. Do you have any questions about your sentences?

DEFENDANT KEARNEY: No, sir.

THE COURT: If you check with the court attendant on your way out, she can tell you where to find

the sheriff's office and the clerk's office. Okay. You are free to go.

* * *

(At which time, Defendant Kearney was excused from the Courtroom and the following record was made.)

* * *

THE COURT: Mr. Blume, you changed your mind [36] and you want to do sentencing today?

DEFENDANT BLOME: Yes.

THE COURT: Okay. We can go on the record. Go ahead and have a seat.

We are on the record in the State of Iowa versus James Blome. Mr. Blome, it is my understanding you have changed your mind and you want to proceed to sentencing?

DEFENDANT BLOME: Yes, sir.

THE COURT: Okay. Has anybody promises [sic] you anything or threatened you in any way in order to convince you to proceed to sentencing today?

DEFENDANT BLOME: No.

THE COURT: Ms. Richards, is there any evidence by the State?

MS. RICHARDS: Your Honor, Mr. Blome appears to have neither any driving record nor any criminal record in the State of Iowa. I would note, however – let's see – that Mr. Blome's home is in Blooming Prairie, Minnesota, and I am not sure we would have had time to receive any records from there as of this date.

THE COURT: Mr. Blome, did you have any evidence to submit?

DEFENDANT BLOME: No.

THE COURT: Ms. Richards, the recommendation by the State.

[37] MS. RICHARDS: Your Honor, given the fact that I know absolutely nothing about this man's background nor his prior record, I feel that the only appropriate thing that can be done here is to recommend the mandatory minimum of two easy [sic] in jail and a $500.00 fine.

THE COURT: Thank you. Mr. Blome, before I impose your sentence, did you wish to make a statement?

DEFENDANT BLOME: Yes. I know I did wrong and I understand that and because of that I have quit drinking. That's it, I guess.

THE COURT: Mr. Blome, you have heard me sentence several people here today and again, I hope the sentence does two things: it rehabilitates you and protects our community from further offenses from you. I am assuming, Mr. Blome, you have no prior record.

DEFENDANT BLOME: Right.

THE COURT: I think what the sentence needs to do in a general sense is to make you understand how important it is that you exercise your responsibilities as a member of your community. Because if you don't, as you did not in this instance, you end up placing not only yourself, but innocent members of our community at risk of death or serious injury. And you just do not have the right to create that kind of risk. I am sure if some drunk

driver killed a member of your family or close friend of yours, you would be devastated. That's exactly [38] the situation you created when you drove when you were intoxicated. Nobody really goes out intending to drink to the point of intoxication, gets in their car and gets arrested or gets in an accident and kills somebody. It is done unintentionally. But it doesn't make any difference. People still get killed and injured every day by drunk drivers. Mr. Blome, I think that imposition of the mandatory minimum penalty is appropriate. I don't see any reason here to impose anything more severe than that. I think by the time you serve your sentence, you will understand how serious the charge is and you will make a decision not ever to let this happen again.

So, Mr. Blome, it is the order of this Court that judgment is imposed and you are adjudged guilty of operating while intoxicated, in violation of Section 321J.2 of the Iowa Code.

You are sentenced to serve two days in the Story County Jail with credit for time served. You are ordered to pay a $500.00 fine, a 30% surcharge and costs.

Judgment having been imposed, you do have a right to appeal the sentence. If you want to appeal, you must file a written notice of appeal with the Clerk within thirty days. If you cannot afford the costs of appeal, those will be provided for you at the public expense, including the services of an attorney and the preparation of a transcript. Bond on appeal is $650.00.

[39] Mr. Blome, I see you posted cash bond here. If you want to, you can use the – part of your bond to pay what you owe and then get the rest back.

DEFENDANT BLOME: That would be fine.

THE COURT: Okay. It is the further order of this Court that the previously posted bond is condemned for payment of the fine, surcharge and costs with the excess to be exonerated to the person posting the bond. Mr. Blome, it is – I will also order you to contact our county sheriff's office by November 30th to make arrangements to serve your sentence, which shall be served by January 15, 1997. I understand you want to serve your time in Minnesota?

DEFENDANT BLOME: Right.

THE COURT: And, I don't care if you do that. But, it will be your responsibility to talk to our sheriff here and the sheriff of the county where you want to serve, so that you can make those arrangements and they can make those arrangements because that sheriff will have to contact our sheriff to make sure you actually show up and serve your two days and I think generally you have to pay – pay that other county to serve time in their jail. So, as long as you can work out the arrangements, I don't care. You just have to have it done by January 15th. And, I would suggest you still go talk to our sheriff's office before you leave today to find out what you need to do to get that accomplished.

[40] DEFENDANT BLOME: Okay.

THE COURT: And then you might want to check up with the Clerk's office and they can tell you when they will be sending you the rest of your bond money and how much you owe all together.

DEFENDANT BLOME: Okay. Thank you.

THE COURT: You are free to go.

* * *

COURT REPORTER'S NOTE: At which time, 2:33 p.m., nothing further was had in this matter on this date.)

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[41] CERTIFICATE OF JUDGE AND
COURT REPORTER
IOWA DISTRICT COURT FOR STORY COUNTY

November 18, 1996

STATE OF IOWA, Plaintiff, v. JON ROBERT LAKE, JASON EVANS, FELIPE TOVART [sic], JAMES BLOME, And JEREMIAH KEARNEY, Defendants.	:	No. SRCR023955, SRCR023980 OWCR023989, OWCR023988, OWCR023956

We, the undersigned District Judge and Official Court Reporter in and for the Second Judicial District of Iowa, do respectively certify that we acted as such District Judge and Official Reporter in the trial of the above-entitled cause. That the annexed and foregoing shorthand report is a true, full, and complete record of the proceeding had and the evidence taken in said cause, and contains, with the exhibits, records, and

documentary evidence therein referred to and identified, all of the evidence offered, given or introduced in said cause upon the trial or hearing thereof, all objections and motions hereto, or any part thereof, all rulings of the Court upon the same, and all exceptions to such rulings, and contains a full, true, and complete report of all proceedings had and that are required to be kept, all as provided by Sections 624.9, 624.10, and 624.11 of the Code of Iowa.

Dated this 18th day of November 1996.

/s/ Steve Van Marel
Judge of the 2d Judicial District

/s/ Karen K. Hill, CSR, RPR
Official Court Reporter

[42] CERTIFICATE

I, Karen K. Hill, an Official and Certified Shorthand Reporter for the State of Iowa, do hereby certify that I was present during the above-entitled matter and took down in shorthand the testimony and other proceedings had, that my shorthand notes were subsequently extended into typewriting, and that the foregoing pages constitute a complete transcript of the proceedings had.

Dated this 29th day of March, 2001.

/s/ Karen K. Hill
Karen K. Hill, CSR, RPR

Transcript ordered by Johnson County Attorney's Office

Transcript mailed: March 29, 2001

EXHIBIT [B]

IOWA DISTRICT COURT FOR STORY COUNTY

STATE OF IOWA, Plaintiff,	:	Case No. SRCR024089, OWCR023989
v. FELIPE EDGARDO TOVAR, Defendant.	:	TRANSCRIPT OF PLEA AND SENTENCING (Filed Apr. 6, 2001)

The above-entitled matter came on for hearing before the Honorable Steven P. Van Marel commencing at 11:45 a.m. on Wednesday, December 30, 1996, at the District Associate Court, Story County Courthouse, Nevada, Iowa.

APPEARANCES

DANIEL GONNERMAN, Assistant Story County Attorney, Story County Courthouse, Nevada, Iowa, appearing on behalf of the State.

FELIPE EDGARDO TOVAR, pro se.

[2] PROCEEDINGS

(Hearing commenced at 11:45 a.m., on Wednesday, [December 30, 1996,] with the Court, counsel, and defendant present in the courtroom.)

THE COURT: We are on the record today in the State of Iowa versus Felipe Tovar, Case 23989. This is the time and place set for sentencing on a charge of operating while intoxicated. And also, Case No. 24089, this is the time and place set for arraignment on a charge of driving

under suspension. We will take up that arraignment first. Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?

THE DEFENDANT: No, I will represent myself.

THE COURT: Mr. Tovar, has anyone promised you anything or threatened you in any way in order to convince you to proceed here today without having an attorney present?

THE DEFENDANT: No, sir.

THE COURT: Mr. Tovar, have you received a copy of the trial information and the minutes of testimony?

THE DEFENDANT: Yes, sir.

THE COURT: And are you charged in your true [3] and correct name?

THE DEFENDANT: Yes, sir.

THE COURT: And did you want me to read that trial information to you or did you want to waive the reading?

THE DEFENDANT: I will waive it.

THE COURT: And how did you wish to plead?

THE DEFENDANT: Guilty.

THE COURT: Mr. Tovar, before I can accept your plea of guilty, I need to take some time here and advise you of your rights, determine if you are entering your plea voluntarily and determine if a factual basis exists for your plea. If at any time during these proceedings you change your mind and you decide you no longer want to plead guilty, tell me that, I will stop the proceedings, and anything that you might have said up to that point in time could not be used against you at your trial. Also, if at any time during these proceedings you change your mind or you do not understand something, please tell me that, and I will explain to you what it is you did not understand. How old are you, Mr. Tovar?

THE DEFENDANT: Twenty-one.

THE COURT: And what's the extent of your education?

THE DEFENDANT: I am currently enrolled in the university.

THE COURT: So you obviously read and write [4] the English language?

THE DEFENDANT: Yes.

THE COURT: Are you currently under the influence of any kind of a drug or alcoholic beverage?

THE DEFENDANT: No, sir.

THE COURT: Are you currently on parole or probation?

THE DEFENDANT: No, sir.

THE COURT: Has anyone promised you anything or threatened you in any way in order to convince you to enter this plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Mr. Tovar, if you continue with this desire to plead guilty, there are certain rights that you will be giving up and I now want to explain those rights to you. First of all, if you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a trial of any kind on that. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: At that trial, you would have a right to be represented by an attorney, including a court appointed attorney. However, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial. Do you understand [5] that?

THE DEFENDANT: Yes, sir.

THE COURT: If you enter a plea of not guilty, you would have a privilege against self-incrimination, which means that you could not be forced to testify at your trial, and if you elected not to testify, that election could not be used against you in any way. However, if you plead guilty, you give up that privilege against self-incrimination, and you will be required to admit your guilt here in the courtroom today. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you enter a plea of not guilty, you would be presumed innocent until the State, if ever, proved you guilty beyond a reasonable doubt. But if you plead guilty, you give up that presumption that you are innocent, and by the admissions that you make in court today, you will be proving your guilt beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you enter a plea of not guilty, you would have a right to subpoena witnesses. That means you could force witnesses to appear and testify. But, if you plead guilty, you give up that right. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you would enter a plea of not guilty, the witnesses whose names are listed on the minutes of [6] testimony would be required to appear and testify in front of you and your attorney and be subject to cross-examination by your attorney. But, if you plead guilty, you give up that right, and none of those witnesses will ever appear in court and testify in your case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Mr. Tovar, knowing those to be the rights that you must give up if you plead guilty, did you still wish to plead guilty?

THE DEFENDANT: Yes, sir.

THE COURT: The charge of driving under suspension carries a maximum penalty of up to a year in

jail and up to a $1,500.00 fine, and it carries a mandatory minimum fine of $250.00 fine. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand at sentencing I can impose the maximum penalty if I think it is appropriate?

THE DEFENDANT: Yes.

THE COURT: Mr. Tovar, before I can accept your guilty plea, I need to be satisfied that you are in fact guilty of the offense charged. I do that by satisfying myself that you have committed the elements of the crime. And in this case there are two elements. The first element would be that on or about November 18th, 1996, you operated a motor vehicle in the – on a public highway in the State of Iowa. The second [7] element of the offense would be that when you did so, your driving privileges were under revocation. Mr. Tovar, on November 18, 1996, did you operate a motor vehicle on a public highway in Story County?

THE DEFENDANT: Yes, sir.

THE COURT: And you were driving on Highway 30 outside of Nevada; is that right?

THE DEFENDANT: I was leaving court here that day at sentencing or whatever.

THE COURT: At the time you were driving, were your driving privileges under revocation?

THE DEFENDANT: Yes.

THE COURT: Mr. Tovar, for the last time, did you still wish to enter this plea of guilty?

THE DEFENDANT: Yes.

THE COURT: Mr. Gonnerman, do you know of any legal cause why I should not accept Mr. Tovar's plea?

MR. GONNERMAN: No, Your Honor.

THE COURT: Mr. Tovar, I find that you have entered your plea of guilty voluntarily, with a full understanding of your rights, with a full understanding of the consequences of your plea. I find a factual basis exists for your plea and I do accept your plea of guilty.

Now that I have accepted your guilty plea, you have another right that I want to tell you about and that is your [8] right to file a motion in arrest of judgment. A motion in arrest of judgment is a motion that you must file if you want to challenge or attack the validity of this plea of guilty. If you think your plea of guilty is defective, you must challenge my acceptance of your guilty plea by filing a motion in arrest of judgment. And, in order for that motion to be effective, you have to file it at least five days before you are sentenced. You have a right to wait at least fifteen days from today before you are to be sentenced. If you wish, you may waive this additional fifteen day waiting period and you may proceed to sentencing today. If you proceed to sentencing today that means that you will be waiving and giving up your right to file a motion in arrest of judgment because you simply would not have time to file that motion before we sentence you. So, what that means is that if you are sentenced today, you are giving up forever your ability to challenge or attack your

guilty plea and the only thing you can appeal is the sentence. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And, did you want to be sentenced today or at a later date?

THE DEFENDANT: Yes, I will just be sentenced today.

THE COURT: Has anyone promised you anything or threatened you in any way in order to convince you to proceed [9] to sentencing at this time?

THE DEFENDANT: No, sir.

THE COURT: Mr. Tovar, I find that you have voluntarily and intelligently waived your right to file a motion in arrest of judgment and your right to have time prior to sentencing. And, the Court will proceed to sentencing at this time, both on this charge of driving under suspension and on your charge of operating while intoxicated. And, Mr. Gonnerman, is there evidence by the State?

MR. GONNERMAN: Yes, Your Honor. The State offers State's Exhibit 1, which is a certified copy of the defendant's driving record.

THE COURT: Mr. Tovar, any objection to Exhibit 1?

THE DEFENDANT: No, sir.

THE COURT: Exhibit 1 is admitted.

MR. GONNERMAN: Your Honor, I would further state to the Court that our records indicate that

Mr. Tovar has no other criminal convictions other than those noted on the driving record.

THE COURT: And, Mr. Tovar, did you have any evidence to submit?

THE DEFENDANT: No.

THE COURT: Mr. Gonnerman, the State's recommendation.

[10] MR. GONNERMAN: State has no recommendations, Your Honor.

THE COURT: Mr. Tovar, before I impose your sentence, you have a right to make a statement. So if there is anything you want to tell me about yourself or about these offenses or any kind of recommendation you want to make, this is your opportunity.

THE DEFENDANT: Well, I just want to know – I mean, if there is any way, you know, they could somehow be like a lesser charge or something because, I mean, I came that day that I was driving under suspension. I am not from around here. So, I didn't have nobody to bring me, and that day I had to come to court for the O.W.I., and then if I didn't come, I would have contempt of court or whatever. That's the only reason why I came. That's the only reason what [sic] I was driving. So, if that could – I mean –.

THE COURT: Anything else?

THE DEFENDANT: That's it, really.

THE COURT: Okay. Well, Mr. Tovar, you pled guilty to the driving under suspension charge, so it won't – it can't be amended to a different charge, so you are stuck with that charge.

THE DEFENDANT: Okay.

THE COURT: Mr. Tovar, on these two charges, I hope the sentence that I am going to impose will accomplish two [11] things: your rehabilitation and protection for our community from further offenses from you. Mr. Tovar, on the charge of operating while intoxicated, you must understand how dangerous and how serious that charge is. You could have easily been involved in a serious accident and killed somebody's child or destroyed a family. You have no right to create that kind of a risk when you drive a car. Mr. Tovar, you need to exercise much better decision-making abilities in the future because you cannot continue to place the lives of innocent people at risk of death or serious injury. The charge of operating while intoxicated carries a mandatory minimum sentence of two days in jail and a payment of a $500.00 fine and that is the sentence I will impose. You are twenty-one years of age. You are in college and you don't have a prior criminal record, so I don't think that something more severe than the mandatory minimum sentence needs to be imposed. And, I think it is the appropriate sentence, Mr. Tovar. I think by the time you spend two days in jail and pay a $500.00 fine, along with surcharge and costs, you will understand how serious the charge is and how important it is that you make responsible decisions. On the charge of driving under revocation, I will impose the mandatory minimum fine of $250.00, along with the thirty percent surcharge and costs. Mr. Tovar, to say you exercised poor decision making skills when you decided to drive to court is to put things mildly. If you don't have a license, Mr. Tovar, you better make [12] appropriate arrangements to get where you have to be without driving. Because if you drive and you get caught, there are going to be serious consequences. And, there are people right now serving a

year in jail on driving under suspension charges because they couldn't stay out of their car and they kept having the penalties increased and increased until finally they had to sit up in jail for a year and that would be obviously a huge waste of a year of your life. So, Mr. Tovar, I hope you take this opportunity to come to the understanding, you don't have a license, as you need to make appropriate arrangements so you don't drive.

It is therefore the order of this court that in Case No. 23989, judgment is imposed and the defendant is adjudged guilty of operating while intoxicated, in violation of Section 321J.2 of the Iowa Code.

The defendant is sentenced to serve two days in the Story County Jail with credit for time served. He's ordered to pay a $500.00 fine, a thirty percent surcharge and costs. the Defendant shall contact the Story County Sheriff's Office no later than January 15, 1997, in order to make arrangements to serve his jail sentence, and that jail sentence shall be served no later than February 15, 1997. The Defendant is given 120 days in which to pay the fine, surcharge and costs.

In Case No. 24089, judgment and conviction are imposed and the Defendant is adjudged guilty of driving under [13] suspension, in violation of Section 321J.21 of the Iowa Code.

The Defendant is ordered to pay a $250.00 fine, a thirty percent surcharge and the costs. The payment to be made within 120 days.

Judgment having been imposed. Mr. Tovar, you do have a right to appeal both sentences. If you want to appeal, you must do so by filing a written notice of appeal with the Clerk within thirty days. If you cannot afford the

costs of appeal, those will be provided for you at the public expense, including the services of an attorney and the preparation of a transcript. Bond on appeal is $650.00 per charge.

Mr. Tovar, you need to check with the Sheriff's office now and they will tell you now much time you have already served and you need to sit down with them and figure out a time when you want to serve your two days. You have got to get those two days done by February 15. You also need to stop up at the Clerk's office and the Clerk will calculate for you exactly how much you owe in both of these cases and they will explain to you how you an send in your payments.

THE DEFENDANT: Okay.

THE COURT: And do you have any questions about your sentences?

THE DEFENDANT: No, sir.

THE COURT: Okay. Both the Sheriff's office and the Clerk's office are up here on the second floor of this [14] building and since you are here, you might as well go ahead and stop at both places today.

THE DEFENDANT: Okay.

THE COURT: You are free to go.

* * *

(COURT REPORTER'S NOTE: At which time, 12:00 Noon, nothing further was had in this matter on this date.)

* * *

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[15] CERTIFICATE OF JUDGE
AND COURT REPORTER
IOWA DISTRICT COURT FOR STORY COUNTY

December 30, 1996

STATE OF IOWA, Plaintiff, v. FELIPE EDGARDO TOVAR, Defendant.	:	No. SRCR024089, OWCR023989

We, the undersigned District Judge and Official Court Reporter in and for the Second Judicial District of Iowa, do respectively certify that we acted as such District Judge and Official Reporter in the trial of the above-entitled cause. That the annexed and foregoing shorthand report is a true, full, and complete record of the proceeding had and the evidence taken in said cause, and contains, with the exhibits, records, and documentary evidence therein referred to and identified, all of the evidence offered, given or introduced in said cause upon the trial or hearing thereof, all objections and motions hereto, or any part thereof, all rulings of the Court upon the same, and all exceptions to such rulings, and contains a full, true, and complete report of all proceedings had and that are required to be kept, all as provided by Sections 624.9, 624.10, and 624.11 of the code of Iowa.

Dated this 30th day of December, 1996.

/s/ Steve Van Marel
Judge of the 2d Judicial District

/s/ Karen K. Hill, CSR, RPR
Official Court Reporter

---

[16] CERTIFICATE

I, Karen K. Hill, an Official and Certified Shorthand Reporter for the State of Iowa, do hereby certify that I was present during the above-entitled matter and took down in shorthand the testimony and other proceedings had, that my shorthand notes were subsequently extended into typewriting, and that the foregoing pages constitute a complete transcript of the proceedings had.

Dated this 29th day of March, 2001.

/s/ Karen K. Hill
Karen K. Hill, CSR, RPR

Transcript ordered by Johnson County Attorney's Office

Transcript Mailed: March 29, 2001

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR ADJUDICATION OF LAW POINTS

(Filed April 6, 2001)

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

STATE OF IOWA, Plaintiff, vs. FELIPE EDGARDO TOVAR, Defendant.	)	No. OWCR057355 **State's Response to Defendant's Motion for Adjudication of Law Points**

COMES NOW the State of Iowa, by and through Assistant Johnson County Attorney M. Victoria Dominguez and responds to Defendant's Motion for Adjudication of Law Points in the above-captioned matter, and in support states the following:

1. Count I of the above-captioned matter charges the Defendant with Operating while Intoxicated, Third Offense. To enhance the present offense to a Class "D" Felony, the State relies on a conviction for a violation of § 321J.2 of the Iowa Code in Story County, Iowa, Cause No. OWCR023989.

2. Defendant, through counsel, asserts such conviction may not be used to enhance the present offense because the Defendant was unrepresented by counsel, or in the alternative, did not knowingly, intelligently or voluntarily waived [sic] the right to counsel in Cause No. SRCR042666.

3. Defendant relies on *State v. Rater*, 568 N.W.2d 655 (Iowa 1997) for his position.

ARGUMENT

Defendant asserts the State may not use a prior conviction for an Operating while Intoxicated charge to enhance a subsequent violation if the Defendant was unrepresented by counsel or if the Defendant did not waive his right to counsel under the Sixth Amendment to the U.S. Constitution. The State disagrees with Defendant's interpretation of the Rules of Criminal Procedure and case law cited.

In *State v. Rater*, 568 N.W.2d 655 (Iowa 1997), the Defendant was charged with criminal nonsupport of his children. Prior to trial, counsel was appointed to the Defendant and at some point, the Defendant informed the Court he wanted to proceed pro se. The Court established a stand-by counsel for the Defendant in case he needed any assistance during trial. Five days prior to trial, the Defendant informed the Court he was overwhelmed with the rules and other matters which were imperative to represent himself and requested the Court to appoint counsel to represent him. The Court overruled the Defendant's request and subsequently the Defendant was convicted of the charged offense.

The issue in *Rater* was whether the Defendant had waived his 6th Amendment right to counsel. While *Rater* discusses part of the issue in the present Motion to Adjudicate Law Points, it is not dispositive. The facts as set out in *Rater* are incongruous with those in the present case.

The defendant in the present case entered a guilty plea to Operating while Intoxicated on or about November 18, 1996. Exhibit 1, attached, is a transcript of Defendant's arraignment. Exhibit 2, attached, is a transcript of Defendant's sentencing hearing which took place on or about

December 30, 1996. Close examination of Exhibit 1 shows the Defendant not only waived his right to counsel, it shows he did so voluntarily, knowingly, and intelligently.

The Court in OWCR023989 made the Defendant aware of the rights he was waiving by pleading guilty and noted the defendant waived application for a court appointed attorney. *See page 5, lines 1-5.* The defendant responded in the affirmative when asked if he wanted to represent himself at his arraignment. The defendant was in college at the time, understood the English language, and was able to communicate his desires to the court. The defendant engaged in a colloquy with the Court involving every single right he would have if he plead not guilty and what he was waiving by pleading guilty. The defendant's answers were such that the Court was satisfied the Defendant's waiver was voluntary, intelligent or knowingly. Had the defendant not waived his right to counsel knowingly, voluntarily, and intelligently, there would be a scintilla or trace of such on the record.

WHEREFORE, the State prays this Court hold the defendant's current charge may be enhanced to a Third Offense based on this Defendant's voluntarily, knowingly, and intelligent waiver of his right to counsel in OWCR023989.

Respectfully submitted by:

/s/ M. Victoria Dominguez
M. Victoria Dominguez
Johnson County Attorney's Office

cc: CA
Defendant – Attorney Emily Hughes

[Proof Of Service Omitted In Printing]

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

STATE OF IOWA, Plaintiff,	)	No. OWCR057355
vs.	)	JOINT STIPULATION
FELIPE TOVAR, Defendant.	)	(Filed May 8, 2001)

COMES NOW the defendant through counsel, and the State of Iowa through Assistant County Attorney M. Victoria Dominguez, and join together in submitting the following stipulation for the Court to consider:

STIPULATION

1. The State has submitted two transcripts: (1) State's Exhibit A is a transcript from the Story County court dated November 18, 1996; and (2) State's Exhibit B is a transcript from the Story County court dated December 30, 1996.

2. The Defendant stipulates that said transcripts (State's Exhibit A and B) accurately reflect what was said to Mr. Tovar, and what Mr. Tovar said, during these proceedings.

3. The Defendant and the State further stipulate that the transcripts and briefs submitted by both parties may be used to rule upon the defendant's pending Motion for Adjudication of Law Points. The parties hereby waive their right to oral argument in this matter.

Dated this 8th day of May, 2001

/s/ Emily Hughes
EMILY HUGHES
ATTORNEY FOR DEFENDANT
725 South Clinton Street
Iowa City, IA 52240
(319) 351-1327

/s/ M. Victoria Dominguez
M. VICTORIA DOMINGUEZ
ASSISTANT COUNTY ATTORNEY
401 South Clinton Street
Iowa City, IA 52240
(319) 339-6100

Trial Transcript

May 24, 2001

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

STATE OF IOWA,	)	
Plaintiff,	)	No. OWCR057355
vs.	)	TRANSCRIPT OF EVIDENCE
FELIPE EDGARDO TOVAR,	)	
Defendant.	)	

The above-entitled case came on for trial before the Honorable Amanda Potterfield, Judge, at the Johnson County Courthouse, Iowa City, Iowa, at 1:32 p.m., May 24, 2001.

APPEARANCES

KAREN EGERTON, Assistant County Attorney, Johnson County Courthouse, 401 South Clinton, P.O. Box 2450, Iowa City, Iowa 52244, representing the State.

EMILY HUGHES, Assistant Public Defender, 725 South Clinton Street, Iowa City, Iowa 52240, representing the Defendant.

Debra A. Shields
Certified Shorthand Reporter
Linn County Courthouse
P.O. Box 5488
Cedar Rapids, Iowa 52406

(Tr. p. 1) **PROCEEDINGS**

(The trial of this case commenced at 1:32 p.m., May 24, 2001, with the Court, counsel and Defendant present.)

THE COURT: We're in court this morning in the matter of the State of Iowa versus Felipe Tovar. Am I getting close to your name?

THE DEFENDANT: Yes, that's correct.

THE COURT: Go ahead and tell me how [sic] like it to be pronounced.

THE DEFENDANT: Felipe.

THE COURT: And your second name?

THE DEFENDANT: My second – my last name?

THE COURT: Your last name.

THE DEFENDANT: It's Felipe, but Tovar is fine.

THE COURT: Good. Mr. Tovar is personally present in court with his attorney, Emily Hughes. The State is represented by Assistant Johnson County Attorney Karen Egerton.

I understand from review of the file and talking with counsel before we came into court that we're here today to examine Mr. Tovar's waiver of jury trial and, if that is what he intends to do and the State does not resist, then to conduct a stipulated trial on the minutes of testimony that would include preservation of error for (Tr. p. 2) any and all orders that have been entered in this matter. Is that correct, Ms. Egerton?

MS. EGERTON: That's my understanding, Your Honor.

THE COURT: Is that your understanding, Ms. Hughes?

MS. HUGHES: Yes, Your Honor.

THE COURT: Mr. Tovar, I have a written waiver of jury trial that seems to have your signature on it; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you had enough time to talk with Ms. Hughes about your constitutional rights to a jury trial and the consequences of giving up that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions at all about the rights you are giving up and your decision to proceed to the Court on the minutes of testimony today?

THE DEFENDANT: No, I don't have.

THE COURT: The Court will accept your waiver of jury trial. I understand that there is no resistance by the State to this waiver?

MS. EGERTON: That's correct, Your Honor.

THE COURT: We will proceed then to trial based on the minutes of testimony, which previously were filed (Tr. p. 3) herein on December 14, 2000. Ms. Egerton.

MS. EGERTON: Thank you, Your Honor. The State would offer the two-page minutes of testimony into evidence. Those two pages of minutes of testimony also

include witnesses which would be called by the State, including Diane Tott, who is the Clerk of Court of Story County in Nevada, Iowa, and Lodema Berkley, who is the Clerk of Court in Johnson County here. Their testimony, as set out in the minutes of testimony, indicates that they would offer the certified records of conviction of the two prior offenses, as well as the offer of testimony regarding the impaired driving, that he was driving a motor vehicle on December 7 of 2000.

THE COURT: And those minutes of testimony apply to both Count I and Count II; is that correct?

MS. EGERTON: Yes, Your Honor. Also the Driving While Barred. And this is a witness list on there. Dick Hendrickson, who is from the Department of Transportation, who would testify that Mr. Tovar's license was barred at the time of this offense.

THE COURT: Anything additional for the State?

MS. EGERTON: Only, Your Honor, that we would ask the Court to take judicial notice of Judge Conmey's Ruling on the Motion for Adjudication of Law Points, his ruling dated, I believe, May 14 of 2001, denying the (Tr. p. 4) Defendant's motion.

THE COURT: The State will – the Court will take judicial notice of both the two pages of minutes of testimony and Judge Conmey's order.

Anything further for the State?

MS. EGERTON: No, Your Honor.

THE COURT: For the Defense?

MS. HUGHES: Thank you, Your Honor. In order to preserve our record for appeal on the Motion for Adjudication of Law Points that was filed in this case, we would ask the Court to take judicial notice of both the Motion for Adjudication of Law Points that was filed on March 22, 2001, as well as the Memorandum in Support of the Motion for Adjudication of Law Points that was filed on May 8, 2001. We would like the Court to consider these motions as part of the record.

THE COURT: The Court will grant that application and take judicial notice of the Memorandum of Law and the Motion, which are in the file, along with Judge Conmey's order. I thought I saw a transcript, but maybe not.

MS. HUGHES: There was a transcript attached to the State's resistance to the motion.

THE COURT: And the Court will, of course, take judicial notice of all of the pleadings relating to the (Tr. p. 5) Motion for Adjudication of Law Points, which does include a transcript of proceedings from November, 1996, at the Story County Courthouse.

Anything further for the Defense?

MS. HUGHES: No, Your Honor.

THE COURT: Any rebuttal by the State?

MS. EGERTON: No, Your Honor.

THE COURT: Mr. Tovar, since the matter has been submitted on the minutes of testimony, the pleadings and the other documents in the court file, the Court at this time finds that you are guilty of the two crimes charged in

the Trial Information, that is, Operating While Intoxicated as a Third Offender and Driving While Barred. I will set this matter for sentencing. Court Administrator actually will pick the date. I will order a presentence investigation.

Between now and the time of sentencing, if you want to challenge these proceedings, if you believe that there has been any mistake or a defect made in the course of these proceedings, you will need to file a motion in arrest of judgment. That must be filed at least five days before the date of sentencing. And if you want to do that, Ms. Hughes can tell you more about it. If you don't do that, you will waive the defects, if any, in the proceedings that we've had here in court today. Bond will (Tr. p. 6) continue as previously set.

Anything else we need to do today?

MS. EGERTON: I don't believe so, Your Honor.

THE COURT: Ms. Hughes?

MS. HUGHES: No, Your Honor.

THE COURT: Thank you very much.

THE DEFENDANT: Thank you.

* * *

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

STATE OF IOWA, Plaintiff, vs. FELIPE EDGARDO TOVAR, Defendant.	No. OWCR057355 ENTRY OF JUDGMENTS (Filed Sep. 28, 2001)

Defendant appeared in open court this date with his counsel, Emily Hughes. The State was represented by Assistant County Attorney Victoria Dominguez. Statements were made to the Court by counsel and Defendant. No legal cause is shown why judgment should not be pronounced.

On Count I, IT IS THE SENTENCE AND JUDGMENT OF THE COURT, under authority of Iowa Code Sections 321J.2 and 321J.2.2(c) (Operating a Motor Vehicle While Intoxicated – Third Offense), that the Defendant, Felipe Tovar, be sentenced to a period of One Hundred and Eighty (180) days in the Johnson County Jail. All but thirty (30) days of said sentence are suspended, and after said thirty (30) days are served, the Defendant shall be placed on probation for a period of three (3) years to the Sixth Judicial District Department of Correctional Services, subject to their reasonable rules and regulations. Credit is to be given for time previously served in custody on this charge. Said credit shall apply to the unsuspended portion of the sentence.

Defendant shall pay in full the enrollment fee under Iowa Code Section 905.14 at the rate established by the

Sixth Judicial District Department of Correctional Services.

In addition, Defendant is to pay a fine in the amount of Two Thousand Five Hundred Dollars ($2,500.00) plus a surcharge of 30 percent on said fine. Costs are assessed to Defendant.

On Count II, IT IS THE SENTENCE AND JUDGMENT OF THE COURT, under authority of Iowa Code Section 321.561 (Driving While Barred), that the Defendant Felipe Tovar, be sentenced to a period of thirty (30) days in the Johnson County Jail, Iowa City, Iowa. Credit shall be given for time previously served in custody on this charge.

The sentence shall run concurrently with the sentence imposed in Count I.

The fine of $500.00 is suspended. Costs are assessed to the Defendant.

Defendant shall report to the Johnson County Jail, Iowa City, Iowa at 9:00 a.m. on the 2nd day of January, 2002. The Defendant shall be completely sober, free of alcohol and illegal drugs. The Defendant is warned that a test for alcohol will be administered upon entry and that a positive test will be a violation of this order and will lead to further sanctions. The Sheriff shall notify the Clerk of Court and the County Attorney of the Defendant's failure to appear so a decision can be made whether further proceedings against the Defendant are warranted.

IF THE DEFENDANT FAILS TO APPEAR AT THE TIME SET, ANY PEACE OFFICER OF THE STATE OF IOWA IS AUTHORIZED AND DIRECTED, WITHOUT

FURTHER ORDER OF THE COURT, TO TAKE THE DEFENDANT INTO CUSTODY TO BEGIN SERVING THE SENTENCE IMPOSED BY THIS ORDER.

If Defendant is granted accommodation privileges pursuant to Iowa Code Sections 356.25-356.35, Defendant shall serve the sentence in accordance with the Sheriff's rules and regulations and pay the appropriate fees as directed by the sheriff prior to admission.

In the event Defendant fails to report as ordered to jail or not pay court costs as ordered, the County Attorney may file an application for the Defendant to show cause why he should not be held in contempt of the orders of this Court.

Defendant is further ordered to make restitution for court costs and for Public Defender fees at the rate of $50.00 per hour times the hours certified.

The Sixth Judicial District Department of Correctional Services or other supervising agency or institution shall prepare a plan of payment for the fines and restitution for attorney's fees and court costs and submit to the Court for approval.

As a condition of probation, Defendant shall successfully complete substance abuse counseling and treatment, if deemed necessary by the probation officer.

The facts for and reasons supporting the sentence are:

1. Defendant's considerable achievements as a student and in his employment;

2. Defendant's driving record and criminal history record; and

3. It is the hope of the Court that this sentence will rehabilitate the Defendant and protect the community.

Under authority of Iowa Code Section 321J.4.3(a), the Iowa Department of Transportation shall revoke the Defendant's motor vehicle license for a period of six (6) years.

Appeal rights were given to Defendant. Appeal bond is set in the amount of $1,000.00 on Count I and $1,000.00 on Count II, cash or surety.

Appearance bond is exonerated.

Clerk to furnish a copy of this entry of judgment to the County Attorney, Defense Counsel, the Johnson County Sheriff, Sixth Judicial District Department of Correctional Services and the Iowa Department of Transportation.

Dated this 28th day of September, 2001.

/s/ Amanda Potterfield
AMANDA POTTERFIELD,
Judge Sixth Judicial
District of Iowa

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

(4)

No. 02-1541

In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF FOR PETITIONER

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55 pp

QUESTION PRESENTED

Does the Sixth Amendment require a court to give a rigid and detailed admonition to a non-indigent *pro se* defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty, and that without an attorney the defendant risks overlooking a defense?

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OPINIONS BELOW

The Petition for *certiorari* contains the opinion of the Iowa Supreme Court (Pet. App. 1-22), which is also reported at 656 N.W.2d 112 (Iowa 2003). The Petition also contains the earlier rulings on the issue here, by the Iowa Court of Appeals and the Johnson County District Court. Pet. App. 23-30, 33-37.

JURISDICTION

The Iowa Supreme Court ruled on January 23, 2003, reversing Felipe Edgardo Tovar's conviction on the basis of the Sixth Amendment alone. Pet. App. 2, 19. The State petitioned for a writ of *certiorari* on April 18, 2003, which the Court granted on September 30, 2003. Jurisdiction rests on 28 U.S.C. sections 1257(a), 2102.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel in his defence.

U.S. Const. amend. VI.

The appendix to this brief contains the rule for accepting guilty pleas, Iowa Rule Criminal Procedure 8 (1992), and the statute prohibiting operating a vehicle while intoxicated (OWI), Iowa Code sections 321J.1 and 321J.2 (1995). These versions were in effect at the time Tovar pleaded guilty in 1996.

The Petition contains those relevant portions of Iowa Code section 321J.2 and Iowa Rule of Criminal Procedure 2.8 which were in effect at the time Tovar was convicted of third offense OWI. Pet. 3-4.

STATEMENT

Respondent, Felipe Edgardo Tovar, was found guilty by an Iowa district court of Operating While Intoxicated (OWI), third offense, and of driving while license barred. Pet. App. 33. He appealed his OWI conviction, alleging the district court erred in using his first OWI conviction (in 1996) to enhance his current conviction. *Id.* at 2. Specifically, he claimed that his first OWI conviction resulted from an uncounseled guilty plea for which there was an invalid waiver of counsel. *Id.* The Iowa Court of Appeals affirmed the conviction. *Id.* at 30. The Iowa Supreme Court reversed, holding that the information that the 1996 court provided Tovar was inadequate to ensure a knowing, voluntary and intelligent waiver of counsel as required by the Sixth Amendment. *Id.* at 18-19. At issue in this case is what admonitions the Sixth Amendment requires trial courts to give defendants who choose to plead guilty *pro se*.

Facts

1. On November 2, 1996, Tovar drove while intoxicated in Ames, Iowa. J.A. 23. Two weeks later, on November 18, 1996, he appeared for arraignment in Story County, Iowa. *Id.* at 7-8. Tovar appeared with four other men who were pleading guilty to misdemeanor charges. *Id.* at 6-10. The others' charges included marijuana possession, driving while license suspended, and operating while intoxicated. *Id.* Since the plea hearings would be similar, the court asked to combine the hearings and all agreed. *Id.* at 11.

The court then commenced a guilty plea colloquy pursuant to Iowa Rule of Criminal Procedure 8(2)(b). *See* App. 1-2. Addressing Tovar, the plea court stated: "I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?" J.A. 8-9. Tovar replied, "Yes, sir." *Id.* at 9. Tovar also said he would "waive the reading" of the trial information. *Id.*

Upon inquiry from the court, Tovar stated he was 21, in college, could read and write English, and was not under the influence of any drug or alcohol. *Id.* at 12-13. He also affirmed that no one had promised him anything or threatened him in any way to plead guilty. *Id.* at 14. The court then went on to say:

> Gentlemen, before I can accept your pleas of guilty, I need to take some time this afternoon and explain to you what your rights are, make sure you understand those rights, and make sure you understand what rights you will be giving up

> by pleading guilty. If at any time during these proceedings you do not understand something, please feel free to interrupt me and tell me that and I will be happy to explain to you what it is you did not understand. Also, if at any time during these proceedings you change your mind and you decide you no longer want to plead guilty, just tell me that, I will stop the proceedings in your case and anything that you might have said up to that point in time could not be used against you at your trial.

Id.

Tovar said that he understood when the court explained he was entitled to a speedy and public trial by jury; by pleading guilty he would give up his right to a trial of any kind. *Id.* at 15. He understood that at trial he had the privilege against self-incrimination and if he chose not to testify, the prosecution could not comment on that fact to the jury. *Id.* at 16.

On the other hand, the court explained:

> If you would enter a plea of not guilty, not only would you have a right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf. But, if you plead guilty not only do you give up your right to trial, you give up your right to be represented by an attorney at that trial.

Id. at 16.

By pleading guilty, the court explained, Tovar would lose the presumption of innocence, the opportunity to force the State to prove his guilt beyond a reasonable doubt, the right to confront witnesses against him, and to force witnesses to testify in his behalf. *Id.* at 17-19. Knowing this, he still wished to plead guilty. *Id.* at 19.

The court then discussed the range of punishments Tovar faced. Tovar was charged with first offense OWI, a serious misdemeanor punishable by a year's incarceration and a $1,000 fine. *Id.* at 8, 20; *see* Iowa Code § 321J.2(2)(a) (1995) at App. 2. The offense carried a mandatory minimum two days' incarceration and a $500 fine. Iowa Code § 321J.2(2)(a) at App. 3.

The court explained (and Tovar again indicated he understood) that:

> [b]efore I can accept your pleas of guilty, I need to be satisfied that you are in fact guilty of the offense you are pleading to. And, I do that by satisfying myself that you have committed the elements of the offense and I need to spend a little bit of time now with each of you individually and explain to you what the elements are and determine whether or not you committed those elements.

Id. at 21-22.

With respect to Tovar, the court explained:

> That charge just has two elements to the offense. The first element is that on the date listed in the trial information you were operating a motor vehicle in the State of Iowa. The second element of the offense is that when you did so, you were intoxicated. Now, under the law of the State of

> Iowa, there are two definitions of intoxication and you may fit one or both of those definitions. One way to be intoxicated is to have had a blood or breath alcohol concentration of .10 percent or more in your body at the time you were driving. The other way to be intoxicated is to be under the influence of alcohol, which means that the consumption of alcohol has affected your judgment or your reasoning or your faculties or it has caused you to lose control in any manner or to any degree of the actions or motions of your body.

Id. at 23.

Tovar admitted that he had consumed alcohol before driving on Lincoln Way, in Ames, Iowa on November 2, 1996 and that his blood alcohol was .194 percent. *Id.* at 24. Although this exceeded the legal limit nearly twice over, Tovar thought the alcohol had no effect on him. *Id.*; *see* Iowa Code § 321J.2(1)(b) at App. 2.

Before finally accepting the plea, the court asked the County Attorney if there were any legal reasons to reject the plea who said there were none. J.A. 28.

The court accepted Tovar's plea as made with full knowledge of his rights and the consequences. *Id.* at 28. It then explained several appeal rights and asked if Tovar wished to be sentenced immediately. *Id.* at 28-29.

Tovar wished to be sentenced later. *Id.* at 29. He then drove from the courthouse, was stopped, and later was charged with driving while under suspension. *Id.* at 45-46, 50, 53; *see* Iowa Code § 321J.21 (1995).

2. Tovar returned five weeks later to the Story County courthouse for sentencing on the OWI offense and

arraignment for driving while under suspension. *Id.* at 45-46. Here it became clear that Tovar was not indigent.

> THE COURT: . . . Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?
>
> THE DEFENDANT: No, I will represent myself.

Id. at 46. The court then went through much of the Rule 8(2)(b) colloquy that occurred in the earlier matter. *Id.* at 46-51. Tovar affirmed that he understood his rights and that there was a factual basis for this second charge. *Id.* at 50-51. The court accepted Tovar's guilty plea for driving with a suspended license. *Id.* at 51.

Before sentencing on the driving while under suspension offense, Tovar explained that he had driven himself to court for the OWI plea to avoid being held in contempt. *Id.* at 53.

Given Tovar's youth and lack of criminal history, the court sentenced Tovar to the mandatory minimum of two days in jail and a $500 fine for the OWI first offense. *Id.* at 54-55. The court allowed Tovar to schedule his own time to serve the two-day sentence. *Id.* at 56.

Procedural Posture

1. Four years later, on December 14, 2000, the Johnson County Attorney charged Tovar with third offense OWI, a class "D" felony under Iowa Code section 321J.2(2)(c) (1999). Pet. App. 38-39.

That spring, Tovar sought to prohibit the Johnson County District Court from using his first OWI conviction from Story County, Iowa, to enhance his offense from an aggravated misdemeanor to a class "D" felony. *Id.* at 3-4; *compare* Iowa Code § 321J.2(2)(b) *with* subsection (c) (1999). His sole claim was that the 1996 conviction was uncounseled. J.A. at 3-4.

The parties stipulated to the introduction of two transcripts from Tovar's 1996 conviction. *Id.* at 62. Based on these transcripts, the Johnson County District Court denied Tovar's application. Pet. App. 35-37.

On May 24, 2001, Tovar stipulated to a bench trial on the minutes of testimony. J.A. 65-66. The court convicted Tovar of third offense OWI and driving while license barred. Pet. App. 33-34; *see* Iowa Code §§ 321J.2(2)(c), 321.561 (1999). The Court later sentenced Tovar to a 180-day jail term (all but 30 days suspended), three years' probation, and a $2,500 fine plus surcharges. J.A. 71-72.

2. Tovar appealed the OWI conviction and the Iowa Court of Appeals affirmed. Pet. App. 30. The court concluded that in 1996 Tovar was sufficiently aware of his right to have counsel present and the possible consequences of forgoing counsel. *Id.* at 29.

3. The Iowa Supreme Court reversed. *Id.* at 2. In a 4-3 decision, the Court held it could not conclude from the record that Tovar understood the usefulness of counsel or

the dangers and disadvantages of proceeding *pro se*. *Id.* at 19. The court held that although a plea court need not assume the role of an attorney and discuss various available defenses, a court must admonish the defendant of the usefulness of an attorney, the dangers of self-representation, the charges and range of punishments, that an attorney may provide an independent opinion whether it is wise to plead guilty, and that without an attorney the defendant risks overlooking a defense. *Id.* at 18-19.

To reach this conclusion, the majority looked to the Ninth Circuit's holding with respect to waivers of counsel in misdemeanor domestic abuse cases. *Id.* at 17; *see Akins v. United States*, 276 F.3d 1141 (9th Cir. 2002). The Ninth Circuit held that, for purposes of later firearms possession charges, it will not countenance an earlier *pro se* guilty plea unless that plea was accompanied by a separate colloquy discussing the dangers and disadvantages of self-representation. *Akins*, 276 F.3d at 1147; *see* 18 U.S.C. § 922(g)(9) (prohibiting weapons possession by those previously convicted of misdemeanor domestic violence). The Ninth Circuit stated – and the Iowa Supreme Court agreed – that "[t]he defendant may be 'guilty' in a layman's sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime." *Akins*, 276 F.3d at 1148; *see* 18 U.S.C. § 921(a)(33)(B)(i) (requiring knowing and intelligent waiver of counsel).

Three members of the Iowa Supreme Court dissented. They stated that the majority ruling unnecessarily depreciated the consequences of a settled conviction, entered upon a solemn admission of guilt in open court. Pet. App. 19. The dissent asserted such a result should obtain only

on a convincing showing the defendant was not guilty in the earlier proceeding or on compelling federal authority. *Id.* at 20. The dissenting members believed that under *Patterson v. Illinois*, 487 U.S. 285, 298 (1988), Tovar's waiver of counsel was valid given his awareness of the adverse consequences of his actions through the guilty-plea admonition. *Id.* at 21.

SUMMARY OF ARGUMENT

When a court is already engaging a defendant in a detailed guilty plea colloquy, the Sixth Amendment does not require a separate litany for waiver of counsel. The plea colloquy makes a defendant sufficiently aware of the relevant circumstances and likely consequences of going forward without counsel. The judgment of the Iowa Supreme Court should therefore be reversed.

1. A defendant may waive constitutional rights so long as the waiver is "knowing and intelligent." *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). In determining whether defendants have acted in a "knowing and intelligent" manner, this Court has taken a pragmatic approach, instructing that the procedures for waiver fit the complexity of the task confronting the defendant. To the extent courts are required to provide information to defendants, it is simply to assure the defendant is acting with "eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

Furthermore, defendants who waive their constitutional rights are not entitled to be informed of all relevant subsidiary facts. Rather, the knowledge of relevant circumstances and likely consequences a defendant must

possess does not mean *complete* knowledge or *full* appreciation of the consequences. *United States v. Ruiz*, 536 U.S. 622, 623 (2002); *Patterson v. Illinois*, 487 U.S. 285, 294 (1988). Adequacy, not perfection, measures the constitutional validity of waiver of counsel procedures. And, as to waivers of the right to counsel specifically, defendants need be aware only of the right to have counsel present and the "ultimate adverse consequence" of going without counsel. *Patterson*, 487 U.S. at 294. The specific information that should be conveyed to a defendant to ensure he has that awareness depends on the context, i.e., whether defendant forgoes counsel at trial, at arraignment, or some other phase of a criminal proceeding.

2. A plea colloquy is more than adequate to ensure a valid waiver of counsel, particularly under the facts of this case. The plea colloquy at arraignment offers a ready mechanism for conveying the stakes of proceeding without counsel, and conversely, the tasks with which an attorney could assist a defendant.

The present-day plea colloquy ensures a defendant's understanding of a host of rights, privileges, and consequences. During a plea colloquy, the court advises the defendant of the right to counsel, the nature of the offense charged, the maximum and minimum possible punishments, as well as the full panoply of trial rights the defendant forgoes by pleading guilty. *See* App. 1-2; Pet. 3-4. The court also will engage the defendant in a full discussion of the factual basis for the charge, involving the elements of the offense and the defendant's version of what occurred. App. 1; Pet. 4. A complete plea colloquy, such as Tovar received, protects the innocent from pleading guilty to the wrong crime or grade of offense. *See Ruiz*, 536 U.S. at 631.

3. A mandatory, separate waiver of counsel colloquy is not necessary, let alone required by the Constitution, especially given the heavy volume of misdemeanor guilty pleas and enhanceable offenses. When enhancement statutes are involved, requiring an evaluation of a separate waiver of counsel colloquy entails a burdensome record search, searches that often will prove frustrating given the great numbers of misdemeanors and the widely varying recordkeeping practices of police and magistrate courts from which many of these convictions emerge. Nullifying prior convictions for lack of a rigid colloquy marks an unnecessary inroad into the finality of convictions.

Nor would imposing such a waiver of counsel colloquy yield substantial prophylactic benefits. It offers reversible error for the *pro se* defendant who does not question his guilt. The colloquy envisioned by the Iowa Supreme Court – when given alongside a valid guilty plea – conveys no more than what the public knows already: that defense attorneys can try to reduce or eliminate criminal liability.

While the State has no preference for *pro se* guilty pleas, lengthening the plea process for comprehensible, minor offenses does not always serve the legitimate interests individuals have in speedy disposition of simple charges. Moreover, the courts should not discourage a defendant's ready admission of guilt by holding out the prospect of an unknown defense. Doing so delays the rehabilitation process and draws out expense and difficulty for the defendant and his family.

4. Applying these principles here, the record demonstrates Tovar understood what self-representation meant to him. He knew he could have counsel present. He knew

the full range of his constitutional rights, what his crime was, what he did, and the consequences he faced. The Sixth Amendment does not require invalidation of his 1996 guilty plea for enhancement purposes.

ARGUMENT

A. A Valid Guilty Plea Colloquy Provides Sufficient Information For A Non-Indigent Defendant To Make A Voluntary, Knowing, and Intelligent Waiver of Retained Counsel.

1. Defendants validly waive constitutional rights, including the right to counsel, when they are aware of the relevant circumstances and likely consequences of the waiver.

Waiver is an intentional relinquishment of a known privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Such knowing and voluntary waivers occur when made with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The sufficiency of this awareness depends on the facts of each case, including the background, experience, and conduct of the accused. *Zerbst*, 304 U.S. at 464.

The principle underlying *Zerbst* and its progeny is that waiver of Sixth Amendment rights is a solemn act, requiring as searching an inquiry as necessary to ascertain the defendant's understanding. *See, e.g., Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of counsel at trial); *Brady*, 397 U.S. at 748 (waiver of right to trial); *Von*

Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) (plurality opinion) (waiver of counsel and trial); *Zerbst*, 304 U.S. at 464 (waiver of trial counsel). But, this inquiry need only assure that the defendant "knows what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

The Court's reasoning in *Adams* illustrates the purposes of this well-established principle – and its flexibility. There, Adams complained that because he had waived the assistance of counsel, he could not intelligently waive trial by jury. *Id.* at 278. The court declined to accept such a rigid position. *Id.* at 278-79. The Court explained that despite the importance of constitutional safeguards, to deny a defendant the ability to waive them "is to imprison a man in his privileges and call it the Constitution." *Id.* at 280.

The court prefaced this conclusion by acknowledging the ability of trial courts to consider the varying circumstances of individual cases in assessing waiver. *Id.* As other decisions of this Court bear out, the principle of *Adams* is that the importance of a constitutional right and the court's task to assure valid waiver does not hinder an individual's ability to waive that right. All the trial court can and must do is assure itself the defendant acts with eyes open to relevant circumstances and likely consequences.

By comparison, outright denial of counsel is a "*unique* constitutional defect." *Custis v. United States*, 511 U.S. 485, 496 (1994) (emphasis added). Many laudable reasons exist for an inflexible constitutional standard making retained or appointed counsel available at a critical stage of the proceedings. *See, e.g., Argersinger v. Hamlin*, 407

U.S. 25, 37 (1972) (appointment of counsel misdemeanor defendant); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (appointment of counsel for capital defendant).

The issue takes on a different character when an affirmative waiver of counsel emerges from the record. *Cf. Williams v. Kaiser*, 323 U.S. 471, 472 (1945) (granting habeas where indigent defendant asked for yet was not given appointed counsel); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) (requiring that record show judge offered and defendant affirmatively waived trial counsel).

2. The required warnings and procedures for waiver of counsel vary according to the complexity of services an attorney can provide at that stage.

This Court has looked at waivers pragmatically to determine what warnings and procedures are necessary given the purposes a lawyer can serve at the proceeding. *Patterson*, 487 U.S. at 298. Where an attorney has an enormously complicated and important role, such as at trial, the Court has imposed "the most rigorous restrictions on the information that must be conveyed to the defendant, and procedures to be observed before permitting" waiver of trial counsel. *Id.* (citing *Faretta v. California*, 422 U.S. 806 (1975)). Accordingly, waiver of trial counsel requires an especially searching inquiry into the disadvantages of self-representation. *Faretta*, 422 U.S. at 835.

Short of trial, the court's duty to assure a knowing waiver depends on a pragmatic assessment of an attorney's usefulness to the accused at that stage and the dangers of proceeding without counsel. *Patterson*, 487 U.S. at 298. If a defendant understands these "basic facts," the waiver is valid. *Id.*

Patterson addressed post-indictment police questioning where an attorney serves an important, yet relatively limited role, "advising his client as to what questions to answer and which ones to decline to answer." *Id.* at 294 n.6. Thus, a less searching, formal inquiry assures the validity of waiver of counsel. *See id.* at 299-300. An advisory of Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) suffices to alert the accused of the right to counsel and to "the ultimate adverse consequence by virtue of the choice" to proceed without counsel. *Patterson*, 487 U.S. at 293-94, 299-300. These warnings let the defendant know both "what a lawyer could do for him" (namely advise which questions to answer) and the ultimate adverse consequence of making a statement. *Id.* at 294.

The lessons to draw from *Patterson* are that advisories can inform a waiver of more than one right in more than one context. Also, the sufficiency of these warnings varies with the complexity of the task confronting the defendant. This is consistent with the Court's broader waiver jurisprudence allowing trial courts to tailor the rigorousness of the waiver inquiry to the circumstances of the case.

3. An incomplete or faulty understanding of the services an attorney provides does not undermine a waiver made with a full appreciation of the ultimate adverse consequence of self-representation.

Patterson also discussed the principle, widely held, that if a defendant "nonetheless lacked 'a full and complete appreciation of the consequences flowing' from this waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum." *Id.*; *cf. Oregon v. Elstad*, 470 U.S. 298, 316-17 (1985).

Waivers of known rights will stand when the defendant understands the relevant circumstances and likely consequences of the waiver. *Brady*, 397 U.S. at 758. Absent misrepresentation by state agents, the waiver remains knowing and intelligent even though the defendant does not know many of the things an attorney can do for him or even though the plea rests on a faulty premise altogether. *Brady*, 397 U.S. at 757 (citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948)).

Neither the Fifth nor the Sixth Amendment requires a discussion with a suspect or accused of the useful services an attorney can provide. Some of these useful services include managing the incriminating and exculpatory information a defendant reveals, possibly negotiating plea bargains or staving off criminal charges altogether, examining the charging document for legal sufficiency, preparing pre-trial motions, negotiating plea bargains, and asserting affirmative defenses. *See Patterson*, 487 U.S. at 307-08 (Stevens, J., dissenting). A discussion of an attorney's usefulness may, in the exercise of the court's discretion,

prove wise. Respectfully, the Constitution does not require it.

This Court's recent decision in *United States v. Ruiz* underscores the strength of this principle. *Ruiz* repeated the Sixth Amendment requirement that the defendant understand the "relevant circumstances and likely consequences" of waiver. *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (quoting *Brady*, 397 U.S. at 748). The Court observed: "a defendant's awareness of the relevant circumstances[ ] does not require *complete* knowledge of the relevant circumstances." *Ruiz*, 536 U.S. at 630 (emphasis added). The Constitution does not require invalidation of a plea "despite various forms of misapprehension under which a defendant might labor." *Id.*

In support of this position, the Court drew from thirty years of precedent. *See id.* at 630-31 (citing *United States v. Broce*, 488 U.S. 563, 573 (1989) (counsel failed to point out potential defense); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (counseled guilty plea remains valid even if the defendant is unaware of every "plea in abatement"); *Brady*, 397 U.S. at 757 (counseled defendant "misapprehended the quality of the state's case," misapprehended "likely penalties," and failed to "anticipate a change in the law"); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (counsel misjudged admissibility of confession)). Additional precedent supports this position. *See Parker v. North Carolina*, 397 U.S. 790, 797 (1970) (holding counseled guilty plea unreviewable on *habeas* despite being motivated by constitutionally suspect statutory penalty).

The pleas in *Ruiz*, *Brady*, *Tollett*, *McMann*, and others were allowed to stand because ignorance of subsidiary information does not diminish awareness of the ultimate

relevant facts and consequences of waiver. These forms of misapprehension do not diminish either the defendant's knowledge of his own actions or his solemn admission in open court. *See Ruiz*, 536 U.S. at 623; *Tollett*, 411 U.S. at 267; *Brady*, 397 U.S. at 757. Thus, even though some information such as exculpatory information or possible defenses may be critical to a defendant's personal decision to plead guilty, a court need not inform the defendant of it. A defendant essentially knows what an attorney can do when the defendant understands that pleading guilty means conviction and knows retained or appointed counsel can assist. The defendant knows an attorney can work on the issues of guilt and sentencing. *See Patterson*, 487 U.S. at 294. The Constitution mandates no more.

In *Carter v. Illinois*, 329 U.S. 173, 178-79 (1946), the Court held that the Constitution did not require a detailed discussion with the accused of the "various degrees" of offense or the "various defenses" to enter a valid guilty plea.

Two years later, in a case involving a complicated indictment for a capital offense and erroneous legal advice by government attorneys, a plurality of this Court discussed a higher standard for waiver of counsel and trial. *Von Moltke*, 332 U.S. at 723-24. Recognizing the complexity of the charge determined the level of inquiry, the plurality stated a waiver of counsel and trial:

> must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke, 332 U.S. at 724 (Black, J., plurality opinion). Although some of the plurality's factors have found purchase among lower courts, the broader rule asks whether the defendant understands the ultimate adverse consequences of proceeding without counsel. *See Patterson*, 487 U.S. at 293-94.

A plea colloquy serves that function. It informs the *pro se* defendant that confessing guilt means certain conviction. The plea colloquy ensures defendant's understanding of the charges, terms, punishment within a certain range, and forgone trial rights, including the right to trial by jury, subpoena power, and privilege against self-incrimination. *See Henderson v. Morgan*, 426 U.S. 637, 646 (1976) (requiring plea court to explain charges and elements of offense); *Boykin*, 395 U.S. at 243 (requiring plea court to discuss privilege against self-incrimination, trial by jury and confrontation rights). Although the Iowa Supreme Court disagreed, a majority of lower courts that have considered the question require no more than a valid guilty plea to convey the necessary information to assure a knowing and voluntary waiver of counsel. *See* App. 4-7; Pet. 14-19; Reply for Pet. 3-5; *see also* 3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, *Criminal Procedure* § 11.3(b), p. 542 (1999) ("*Von Moltke* is generally viewed as not establishing strict constitutional requisites even" in guilty pleas at arraignment).

The "knowing and voluntary" standard for a guilty plea assures that "the defendant actually *does* understand the significance of the consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) (emphasis in original) (citing *Faretta*, 422 U.S. at 835; *Adams*, 317 U.S. at 279; *Boykin*, 395 U.S. at 244). Knowing the circumstances

of a guilty plea and the consequences of pleading without counsel satisfies the Constitutional minimum.

The Constitution does not demand a more technical procedure. This Court has eschewed "delusively simple rules of trial procedure which judges must mechanically follow," focusing rather on what information the defendant actually had – as shown by the totality of circumstances – to ascertain whether the defendant acted with "eyes open." *Adams*, 317 U.S. at 279; *see United States v. Hill*, 252 F.3d 919, 928 (7th Cir. 2001) (Easterbrook, J.) (noting *Zerbst*, *Adams*, and *Faretta* asked what the defendant understood "not whether the judge used a check-off list" because "lists do not convey knowledge or change minds").

4. Compared to trial, an attorney plays a less active role at a plea hearing which is procedurally less complex; the substance of a waiver of counsel colloquy is therefore simpler.

Another aspect to consider when judging the sufficiency of a waiver is the complexity of the proceeding. A trial, of course, is the most demanding setting. There, the Court has imposed the most rigorous standards for information and procedure, and understandably so. *Patterson*, 487 U.S. at 298; *see Faretta*, 422 U.S. at 835. Self-representation at trial hazards numerous pitfalls. Generally speaking, laypersons do not have specialized training in conducting an adversarial hearings. *Patterson*, 487 U.S. at 294 n.6; *Faretta*, 422 U.S. at 834. Even the gifted layperson can struggle with rules of procedure and evidence, jury *voir dire*, examination and cross-examination of witnesses, lodging objections, and more. *Patterson*, 487 U.S. at 300 n.13.

Unlike a plea proceeding, trial procedure does not itself convey in neat form the elements of the offense and the range of punishments nor imply basically what an attorney will do. Accordingly, a *Faretta*-type colloquy is necessary to discuss the dangers and disadvantages of proceeding without counsel. *Faretta*, 422 U.S. at 835.

Of course, a court may go too far in warning a defendant away from self-representation.[1] That situation did not happen here because the plea court did not dissuade Tovar from self-representation. And yet, the colloquy that the Iowa Supreme Court has now imposed for waiver of counsel could discourage self-representation. If adopted as

[1] Generally, the prospect of self-representation poses a dilemma for trial judges. *See Strozier v. Newsome*, 871 F.2d 995, 997 (11th Cir. 1989); *see also Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 164 (2000) (Breyer, J., concurring) (*noting United States v. Farhad*, 190 F.3d 1097, 1107 (9th Cir. 1999) (stating right to self-representation may conflict with right to fair trial)). Additionally,

> [i]f the judge goes too far in cautioning the defendant against proceeding without the assistance of counsel (as would be the protective tendency), there is the risk of infringing on the defendant's constitutional right of self-representation. If, on the other hand, the trial judge does not counsel the defendant sufficiently in this regard, the defendant may be deprived of his or her constitutional right to the assistance of counsel.

Crane v. Radeker, 580 F.Supp. 2, 4-5 (M.D. Tenn. 1983). In any event, the assertion of self-representation "paves the way for a challenge to any resulting conviction." *Id.* at 5.

The solution the majority of lower courts has found is for the trial court to ensure an unequivocal assertion of self-representation appears in the record as well as the defendant's understanding of the consequences of the decision as revealed by the entire record. *See, e.g., Strozier*, 871 F.2d at 998; *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065-67 (11th Cir. 1986). In the context of a guilty plea, a constitutionally valid plea colloquy will provide this record evidence.

the Sixth Amendment standard, such an advisory cements the troublesome dilemma facing trial judges when a person wishes to plead guilty *pro se*.

The rules of procedure for entry of guilty pleas, unlike trial procedure, offer a comprehensible mechanism to confess guilt that a layperson can understand. This is particularly true for drunk driving cases where the elements are readily understood by the public. *See, e.g., State v. Rater*, 568 N.W.2d 655, 660 (Iowa 1997); *State v. Strain*, 585 So.2d 540, 543-44 (La. 1991).

Pleading guilty under current plea-taking procedure is easier and simpler than conducting one's own trial. It is a shorter proceeding. *Godinez*, 509 U.S. at 398-99. The judge guides the defendant through it. *See, e.g.*, Iowa R. Crim. P. 8 at App. 1-2; Pet. App. 4. The defendant does not have to contend with rules of evidence, procedure, trial practice, or jury persuasion. The plea proceeding's outcome is certain while a trial's outcome is uncertain. Although pleading guilty *pro se* is an unquestionably profound and serious act, warranting deliberation, the commensurate structure and detail of a plea colloquy serves the purposes of securing valid waivers of counsel under the Sixth Amendment.

B. The Many Elements Of A Valid Guilty Plea Colloquy Supply Record Evidence Defendant Understood The Relevant Circumstances And Likely Consequences Of Proceeding Without Retained Counsel And Pleading Guilty.

1. Guilty plea colloquies offer ample information to support a waiver of the right to counsel.

A state court must ensure the record shows a defendant understands several rights which a guilty plea

waives: the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Boykin*, 395 U.S. at 243. The court must also explain the charges and elements of offense. *Henderson*, 426 U.S. at 646.

By rule in Iowa, a court must ensure a defendant understands numerous other privileges waived by a guilty plea. Under Iowa Rule of Criminal Procedure 8(2)(b), the court must record the defendant's understanding of:

> 1. The nature of the charges to which a plea is offered;
>
> 2. The mandatory maximum and minimum punishments for the offense;
>
> 3. That the defendant has the right to a trial by jury, the assistance of counsel, the right to cross-examine witnesses, the right against self-incrimination, and the right to compulsory process;
>
> 4. That a guilty plea means there will be no trial.

App. 1-2.

Perhaps most important, the court must assure itself that a factual basis exists for the plea. *Id.* This is not unique to Iowa's Rule 8. *See* Fed. R. Crim. P. 11; *see also, e.g., Boykin*, 395 U.S. at 243 n.5; Ariz. Rs. Crim. P. 17.1-17.3; Conn. R. Crim. P. (Super. Ct.) § 39-21; Del. R. Crim. P. 11; Fla. R. Crim. P. 3.172; Tex. Crim. Pro. Art. 26.13 (2003).

An Iowa plea colloquy supplies more than the *Boykin* litany. *See Boykin*, 395 U.S. at 243. It must also ensure the defendant is acting voluntarily, without improper pressure by promises or threats. *See Brady*, 397 U.S. at 754-55. It

reflects most of the factors listed by the plurality opinion in *Von Moltke*, 332 U.S. at 724. But, consistent with *Carter v. Illinois*, the plea colloquy does not require a discussion of specific potential defenses or mitigating circumstances. 329 U.S. at 178.

Significantly, the rule ensures that the plea is more than just voluntary. It requires an explanation of the elements of the offense and a finding that a factual basis exists for the plea – the court cannot accept a plea if the defendant recites facts inconsistent with guilt of the charged offense. *See, e.g., Henderson*, 426 U.S. at 646 (granting relief on *habeas* where defendant pleaded guilty but court did not explain element of intent); *State v. Ohnemus*, 254 N.W.2d 524, 525 (Iowa 1977) (relying on *Henderson* and reversing plea where defendant's statements that he did not enter home with intent to harm anyone negated element of burglary offense and trial court should not have accepted guilty plea).

A guilty plea colloquy, therefore, ensures a valid waiver of counsel: the defendant knows of the right to have retained counsel present, learns the nature of the offense, the range of punishments, and the full panoply of constitutional trial rights and that to go forward with a guilty plea means certain conviction. The defendant therefore enters the plea with "eyes open" to the consequences. *Adams*, 317 U.S. at 279. The plea colloquy makes plain that an attorney's role would be to challenge the charge or sentence. The plea will go forward without counsel to certain conviction and sentence.[3]

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[3] Not surprisingly then, numerous state courts that have addressed the issue have held that plea colloquy warnings suffice for

(Continued on following page)

2. The presence of a valid plea colloquy allays concern that without counsel, the innocent will plead guilty to the wrong crime or grade of offense.

A solid plea colloquy provides record evidence which "diminishes the force of . . . concern that . . . innocent individuals, accused of crimes, will plead guilty." *Ruiz*, 536 U.S. at 631. Here, for example, the Story County Court elicited Tovar's full understanding of the only two elements of this offense: 1) driving within the state 2) while having a blood alcohol content greater than .10 percent. J.A. 23-24. This should alleviate any concern that Tovar was innocent or that this educated young man pleaded to

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waivers of counsel. *See, e.g., State v. Natoli*, 764 P.2d 10, 11-12 (Ariz. 1988) (holding that OWI guilty plea will not be overturned on collateral attack where court advised defendant of right to counsel, defendant waived it, and record appears otherwise valid on its face); *King v. State*, 804 S.W.2d 360, 362 (Ark. 1991) (record that defendant waived "his right to consult with an attorney" created presumption that earlier guilty plea to OWI was valid and could be used for enhancement); *People v. Gonzales*, 446 N.W.2d 296, 298-99 (Mich. Ct. App. 1989) (allowing enhancement of drunk driving offense based on prior plea where defendant understood right to counsel, waived it, and entered guilty plea); *State v. Wolfe*, 75 P.3d 1271, 1272-73 (Mont. 2003) (in enhancement case, holding separate "dangers and disadvantages" discussion in DUI case not necessary so long as waiver is knowing and voluntary); *State v. Werner*, 600 N.W.2d 500, 506-07 (Neb. 1999) (holding waiver form listing elements of DUI offense, punishments and right to counsel shows knowing and intelligent waiver); *State v. Cashman*, 491 N.W.2d 462, 465 (S.D. 1992) (holding that dangers and disadvantages of self-representation are more obvious at a guilty plea to DUI since defendant is fully advised of charges, rights, and punishments).

the wrong grade of crime. *See Tomkins v. Missouri*, 323 U.S. 485, 489 (1945) (counsel must be available to defendant lest the ignorant suffer an excessive punishment).

Generally, the plea colloquy allows the defendant and judge to discuss what defendant did and how it relates to the charges. The truth emerges without litigation, unlike a trial where the truth comes after motion practice, jury *voir dire*, minding the rules of evidence, witness examination and cross-examination, and post-trial motions. *See Patterson*, 487 U.S. at 300 n.13.

In short, the "relevant circumstances" and "likely consequences" for pleading guilty without counsel stand out in sharp relief when a court discusses with a defendant the rights, privileges, and perils of pleading guilty. Furthermore, by fully exploring the elements of offense and the defendant's version of the crime, courts allay concern that the innocent will plead guilty in ignorance. To ask for more, particularly for simple, two-element crimes like OWI, puts form ahead of substance to the detriment of justice.

C. Pragmatic Considerations Relating To The Heavy Volume Of Misdemeanor Guilty Pleas And Enhanceable Offenses Suggest That A Separate, Formal, And Rigid Waiver Colloquy Does Not Serve The Ends Of Justice.

1. The costs of adopting the Iowa Supreme Court's rule for waiver of counsel outweigh the benefits it seeks to provide, particularly in the context of recidivist statutes.

Recidivist statutes, like Iowa Code section 321J.2(2), enjoy a "long tradition" in this country, supported by the

valid public interest in deterring and segregating habitual criminal offenders. *Parke v. Raley*, 506 U.S. 20, 26-27 (1992). A significant body of legislation has emerged to deter repeated criminal activity in Iowa[3] and nationally.[4] *See Ewing v. California*, 538 U.S. 11, ___, 123 S.Ct. 1179, 1202-07, Appendix (2003) (Breyer, J., dissenting) (containing list of sentence enhancement statutes). A constrictive rule – one that limits use of prior offenses for failure to employ a waiver litany not in existence at the time of the plea – will have a significant ripple effect given the high percentage of convictions by plea.

Indeed, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures." *United States v. Timmreck*, 441 U.S. 780, 784 (1979); *accord Bousley v. United States*, 523 U.S. 614, 621 (1998) (noting same policy concern in *habeas* context); *Custis*, 511 U.S. at 497 (underscoring same in sentence enhancement

[3] A short list of recidivist statutes in Iowa include Iowa Code §§ 123.46, 123.91 (public intoxication); §§ 124.401, 124.411 (controlled substance possession); §§ 321.555, 321.560 (revocation of driver's license for habitual offenders); § 321J.4 (six-year license revocation for third-time drunk driver); § 692A.1, 692A.2(3) (requiring lifetime registration as sexual offender after second or subsequent qualifying offense); § 708.2A (domestic abuse assaults); § 708.11 (stalking); § 709.11 (sexual assault); § 713.6A(2) (burglary); § 902.8 (minimum sentence for habitual offenders who have been convicted previously of a felony in Iowa, another state, or another federal court); §§ 901A.1, 901A.2 (enhanced punishment for sexually predatory offenses).

[4] The federal system has its own share of enhanceable offenses. *See, e.g.*, 18 U.S.C. § 922(g)(9) (prohibiting weapons possession by persons previously convicted of misdemeanor domestic violence); 18 U.S.C. § 924(c) (enhanced sentence for second or subsequent firearms statute offender); 21 U.S.C. §§ 842, 843, 844a, 849, 851 (enhanced penalties for second or subsequent drug offenders).

case). Such inroads "inevitably delay and impair the orderly administration of justice." *Custis*, 511 U.S. at 497.

Requiring proof of a lengthier discussion on each of the elements discussed by the Iowa Supreme Court entails a significant record search. A simple notation in a judgment roll or minute entry that a defendant had or waived counsel would not suffice. *See Custis*, 511 U.S. at 496. The hunt for transcripts or other evidence would "require . . . courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 states." *Id.* at 497, *accord Parke*, 506 U.S. at 25 (noting "considerable effort and expense [of] attempting to reconstruct records from farflung States where procedures are unfamiliar and memories unreliable"); *Nichols v. United States*, 511 U.S. 738, 748 (1994) (noting "large number of misdemeanor convictions take place in police or justice courts which are not courts of record. . . . Without a drastic change in the procedures of these courts, there would be no way to memorialize such a warning").

Given the novelty of the Iowa Supreme Court's rule, the endeavor will likely prove frustrating. Whether "due to the staleness or unavailability of evidence . . . [the] legitimate interest in differentially punishing repeat offenders is compromised." *Parke*, 506 U.S. at 32.

Fortunately, the parties here obtained transcripts from Tovar's 1996 Story County plea and sentencing; they were only four years old at the time. Locating aged transcripts will not always be so easy. Iowa allows enhancement for OWI convictions as old as twelve years. Iowa Code §§ 321.12(4), 321J.2(4). For habitual offender

sentence enhancements, there is no time limit. Iowa Code § 902.8.

Statistics and experience suggest that this difficult task will arise frequently, particularly in enhancement cases. According to one study, nearly thirty percent of jail inmates in the nation's 75 largest counties who are accused of public order offenses (including drunk driving) report self-representation. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* 1, 7, Table 14 (Bureau of Justice Statistics, November 2000). Less than one percent of felony defendants, on the other hand, represented themselves. *Id.* at 1.

In Iowa alone, there were 20,522 drunk driving filings – or 23% of the entire criminal docket in 2002. Annual Statistical Report of the Iowa Judicial Branch (2002). Of these filings, 18,753 were misdemeanors and 1,769 were felonies. *Id.* If the staggering number of drunk driving arrests nationally is any measure – 1,434,852 in 2001 – states face a daunting prospect when seeking to use prior offenses for enhancement purposes. This volume of cases suggests numerous, difficult forays to locate transcripts or trial court papers from magistrate or municipal courts. *See Sourcebook of Criminal Justice Statistics Online*, Tables 4.1, 4.6, 4.27, http://www.albany.edu/sourcebook/1995/tost_4.html; *see also Ruiz*, 536 U.S. at 632 (observing that vast majority (90%) of federal convictions result from plea bargains); *Timmreck*, 441 U.S. at 784 (vast majority); *Brady*, 397 U.S. at 752 n.10 (90%-95% of all criminal convictions); Leonidas Ralph Mecham, *Judicial Business of the United States Courts: 1997 Report of the Director* 214 (51,647 of 55,648 defendants pleaded guilty).

2. The benefits of a separate, lengthy waiver of counsel colloquy are limited, particularly for simple offenses.

These unnecessary systemic costs will not uniformly improve the criminal justice system or substantially advance defendants' rights. A litany will not ensure a defendant's understanding. *Hill*, 252 F.3d at 928. It will not stem the flow of appeals, but rather offer another peg on which to hang reversible error. *See State v. White*, 587 N.W.2d 240, 247 (Iowa 1998) (Harris, J., dissenting) ("It is a mistake to answer the siren call of those who suggest that our imposition of more litany will clarify the requirements, so that future mistakes with consequent appeals can be avoided. Every requirement invites more litigation and appeals in order to test whether there has been compliance.").

Besides, in the context of guilty pleas, to say that an attorney can help in the decision whether to plead guilty or can uncover defenses offers something that surely the public knows already. *See Nichols*, 511 U.S. at 748 (upholding use of prior guilty plea despite fact court did not say it could enhance later offense, as it is something defendants surely know already).

The inquiry crafted below may also create an incentive to plead guilty without an attorney, in the hope that the conviction could not be used later. *See State v. Moe*, 379 N.W.2d 347, 349 (Iowa 1985) ("First offense OWI defendants could simply exercise their constitutional right not to be represented by counsel and thus avoid conviction at a later time of second or third offense OWI because their prior convictions were in fact uncounseled.").

3. Pleading guilty to a misdemeanor traffic offense without an attorney can work to a defendant's advantage, suggesting that a wooden rule requiring reversal for lack of a separate waiver colloquy is unnecessary.

Although the State of Iowa has no preference for uncounseled guilty pleas, sometimes defendants benefit from forgoing an attorney when pleading guilty to a first-time misdemeanor:

> [P]robably the vast majority of citizens haled into court on traffic violations share the judge's interest in prompt disposition of their cases, feeling themselves sufficiently inconvenienced by having to make personal appearances in the first place.

In re Johnson, 398 P.2d 420, 427 (Cal. 1965).

Numerous legitimate personal reasons exist for a defendant's choice to expeditiously accept responsibility for a minor traffic offense by entering an unbargained-for guilty plea *pro se* at arraignment. For some people, "their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment." *Brady*, 397 U.S. at 750. The "admissio[n] of guilt . . . if not coerced, [is] inherently desirable." *United States v. Washington*, 431 U.S. 181, 187 (1977); *accord Santobello v. New York*, 404 U.S. 257, 260 (1971) (properly administered, pleas are to be encouraged).

A number of positive effects flow from this admission:

> The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation.

Corbitt v. New Jersey, 439 U.S. 212, 223 n.12 (1978).

Defendants decide to plead guilty without an attorney for more pedestrian reasons as well. Some people mistrust lawyers, do not wish to share the spotlight, believe they are more intense or sincere than a lawyer, or feel attorneys are not worth the expense, particularly where the defendant has already some experience with the criminal justice system. *See, e.g., United States v. Dougherty*, 473 F.2d 1113, 1128-29 (D.C. App. 1972); Marie Higgins Williams, Comment, *The Pro Se Criminal Defendant, Standby Counsel, And The Judge: A Proposal For Better-Defined Roles*, 71 U. COLO. L. REV. 789, 816-17 (2000); *see also* Anthony T. Kronman, *Professionalism*, 2 J. INST. FOR STUDY LEGAL ETHICS 89, 94 (1999) (noting public's low regard for lawyers).

The choice to acknowledge guilt without the delay and expense of hiring counsel should be honored "out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. at 350-51 (Brennan, J., concurring)); *accord Godinez*, 509 U.S. at 400. The choice is all the more honorable since the defendant is the one who suffers the consequences of his actions. *Faretta*, 422 U.S. at 819-20.

Courts should not discourage the ready, unqualified admission of guilt by holding out the prospect of a technical defense, such as a suppression issue in an OWI case, which as the Iowa Supreme Court observed may be the only promising defense. Requiring expression of this notion undermines a key value served by admission of guilt in open court, the chance to unreservedly accept

blame for one's wrongs. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values And Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003).

A valid guilty plea assures the defendant's actual guilt of the charged crime, knowledge of the consequences, and the absence of coercion. Requiring in all cases a separate colloquy which suggests that an attorney could help the defendant avoid culpability can hinder the process of contrition, rehabilitation and reform by facilitating the defendant's state of denial. *See id.* at 1397, 1404-06; *see also* U.S. Sentencing Commission, Guidelines Manual § 3E1.1 (2002) (conferring sentence reductions where the defendant accepts responsibility, including by promptly pleading guilty).

A "wooden rule" requiring reversal is not always necessary. *Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (Kennedy, J., concurring). It is not necessary where the defendant receives a full and valid guilty plea advisory. The absence of a broader discussion of the merits of representation should not require either reversal of the plea or nullification of the conviction for enhancement purposes.

D. Tovar's 1996 Guilty Plea Colloquy Illustrates The Wisdom Of Sixth Amendment Waiver Principles And Shows The Iowa Supreme Court's Interpretation Of The Sixth Amendment Should Not Stand.

In 1996, Tovar faced a minor, easily understood charge of operating while intoxicated. Since he was not indigent, he had a right to hire counsel of his choice. *See Wheat v. United States*, 486 U.S. 153, 159 (1988) (noting Sixth

Amendment right to hire attorney of choice); *see* J.A. 46. By waiving application for appointed counsel, the record shows his awareness of the right to appointed counsel and his affirmatively stated desire to waive. J.A. 8-9, 46. He further understood his right to the assistance of counsel at trial. *Id.* at 16. He knew the elements of the offense, its possible penalties, the presumption of innocence, the standard of reasonable doubt, the subpoena power, the privilege against self-incrimination, and the right of confrontation. *Id.* at 16-19. He conceded he had no quarrel with the evidence of his blood alcohol concentration. *Id.* at 23-24. No legal reason warranted rejecting the plea. *Id.* at 28. He did not assert his innocence by challenging the guilty plea, either by motion in arrest of judgment before sentencing or by direct appeal in 1996. (Nor, apparently, did make a collateral attack at the time of his second OWI offense in 1998.)

A plea of guilty is a solemn act, accepted only with care and discernment. *Brady*, 397 U.S. at 748. That occurred here. The 1996 guilty plea record here stands unblemished by prosecutorial or police misconduct or by judicial error. To paraphrase *United States v. Hyde*, Tovar was pleading guilty because he *was* guilty. 520 U.S. 670, 676 (1997).

The Story County Court in 1996 discharged its responsibility and accepted Tovar's "solemn admission 'in open court that he is in fact guilty.'" *Henderson*, 426 U.S. at 648 (quoting *Tollett*, 411 U.S. at 267). Nullifying that conviction because the 1996 court failed to employ a litany suggested in 2003 diminishes the gravity of pleading guilty. Tovar has never claimed that he was innocent of drunk driving in 1996. To nullify a prior conviction here creates a windfall for unquestionably guilty defendants

who entered knowing and voluntary guilty pleas without counsel.

The Sixth Amendment does not mandate a separate *Faretta*-type colloquy disclosing the "dangers and disadvantages of self-representation" or the benefits of retaining counsel when the defendant is already engaged in a detailed plea colloquy. The Sixth Amendment does not require nullification of a prior conviction for enhancement purposes where the plea-taking court elected not to employ such a specific colloquy. It is not strictly necessary to inform a defendant that technical defenses might exist or that without counsel a person loses the opportunity for an independent opinion on the wisdom of pleading guilty. *See* Pet. App. 18. Advising a defendant that an attorney can be useful merely "tell[s] him what he must surely already know." *Nichols*, 511 U.S. at 748. In the exercise of discretion, declining to do so ought not be reversible error.

In short, the Sixth Amendment does not require this advisory when a defendant enters an otherwise valid guilty plea. Conversely, nullifying facially valid pleas grants unwarranted relief to those who do not assert they are innocent, imposes unnecessary costs on a poorly equipped system, and mutes the call for recidivists to account for their crimes.

CONCLUSION

The State of Iowa respectfully urges this Court to reverse the ruling of the Iowa Supreme Court and uphold Tovar's conviction for Third Offense Operating While Intoxicated.

Respectfully submitted,

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APPENDIX

Iowa Rule of Criminal Procedure 8 (1992)

1. Conduct of Arraignment. Arraignment shall be conducted as soon as practicable.

2. Pleas to the indictment or information.

a. In general. A defendant may plead guilty, not guilty, or former conviction or acquittal. If the defendant fails or refuses to enter a plea at arraignment, or if the court refuses to accept a guilty plea, the court shall enter a plea of not guilty. At any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted.

b. Pleas of guilty. The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The nature of the charge to which the plea is offered.

(2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

(3) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.

(4) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

The court may, in its discretion and with the approval of the defendant, waive the above procedures in a plea to a serious or aggravated misdemeanor.

Iowa Code § 321J.1 (1995)
Definitions.

As used in this chapter unless the context otherwise requires:

1. *"Alcohol concentration"* means the number of grams of alcohol per any of the following:

a. One hundred milliliters of blood.

b. Two hundred ten liters of breath.

* * *

Iowa Code § 321J.2 (1995)

1. A person commits the offence of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions:

a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.

b. While having an alcohol concentration as defined in section 321J.1 of .10 or more.

2. A person who violates this section commits:

a. A serious misdemeanor for the first offense and shall be imprisoned in the county jail for not less than forty-eight hours to be served as ordered by the court, less credit for any time the person was confined in a jail or detention facility following arrest, and assess a fine of not less than five hundred dollars nor more than one thousand dollars. . . . The court may accommodate the sentence to the work schedule of the defendant.

States That Do Not Require A Separate Waiver Of Counsel Colloquy, As Required By The Iowa Supreme Court

State v. Natoli, 764 P.2d 10, 11-12 (Ariz. 1988) (holding that OWI guilty plea will not be overturned on collateral attack where defendant had been advised of right to counsel and waived it and record appears otherwise valid on its face).

King v. State, 804 S.W.2d 360, 362 (Ark. 1991) (record that defendant waived "his right to consult with an attorney" created presumption that earlier guilty plea to OWI was valid and could be used for enhancement).

People v. Paradise, 166 Cal. Rptr. 484, 488 (Cal. Ct. App. 1980) (noting an ever increasing and time consuming burden on courts to "intone ritualistic incantations," a separate "dangers and disadvantages of self-representation" is not necessary if entire record shows defendant waived counsel with "eyes open").

People v. Torres, 157 Cal.Rptr. 560, 563 (Cal. Ct. App. 1979) ("Where the misdemeanor charged is simple and the exposure to punishment is slight then the arraigning judge may accept waiver of counsel without first advising that self-representation is unwise.").

King v. State, 486 S.E.2d 904, 910-11 (Ga. Ct. App. 1997) (signed waiver of counsel before non-negotiated plea to traffic offense suffices) *overruled on other grounds by King v. State*, 509 S.E.2d 32, 37 (Ga. 1998) (invoking court's supervisory power to require verbatim record).

State v. Merino, 915 P.2d 672, 696-97 (Haw. 1996) (given scrupulous adherence to guilty plea colloquy, court need

not go into potential defenses and circumstances in mitigation).

State v. Maxey, 873 P.2d 150, 153-54 (Idaho 1994) (judgments confronting misdemeanor DUI defendant are not sufficiently complex to require separate discussion of dangers and disadvantages of self-representation).

People v. Christensen, 555 N.E.2d 422, 426 (Ill. Ct. App. 1990) (upholding waiver where defendant received valid guilty plea colloquy, including advisory of charges, punishments, and right to counsel).

Redington v. State, 678 N.E.2d 114, 118 (Ind. Ct. App. 1997) (holding court need not advise defendant of "pitfalls of self-representation").

State v. Strain, 585 So.2d 540, 543-44 (La. 1991) (holding that plea judge need not discuss "dangers and disadvantages" because "[t]he crime of driving while intoxicated is a non-complex crime, even among misdemeanors, and is almost self-explanatory.").

Guillemette v. Commonwealth, 377 N.E.2d 945, 948-49 (Mass. 1978) (upholding waiver where defendant did not undermine record evidence he knew right to counsel and waived it).

People v. Gonzales, 446 N.W.2d 296, 298-99 (Mich. Ct. App. 1989) (allowing enhancement of drunk driving offense based on prior plea where defendant understood right to counsel, waived it, and entered guilty plea).

State v. Shafer, 969 S.W.2d 719, 729 (Mo. 1998) (noting "[i]t is not necessary that the defendant be questioned as to all of the things counsel might be able to assist the defendant in the legal processes to follow"). *But see Shafer*

v. Bowersox, 329 F.3d 637, 648 (8th Cir. 2003) (granting *habeas* for failure to apply standards of *Faretta*).

State v. Wolfe, 75 P.3d 1271, 1272-73 (Mont. 2003) (in enhancement case, holding "dangers and disadvantages" discussion in DUI case not necessary so long as waiver is knowing and voluntary).

State v. Werner, 600 N.W.2d 500, 506-07 (Neb. 1999) (holding waiver form listing elements of DUI offense, punishments and right to counsel showed knowing and intelligent waiver).

State v. Montler, 509 P.2d 252, 252-54 (N.M. 1973) (plea colloquy revealed knowing and intelligent waiver of counsel).

State v. Fulp, 558 S.E.2d 156, 159-60 (N.C. 2002) (holding waiver valid if defendant is made aware of right to counsel and appreciates consequences of waiver, charges, and range of punishments).

State v. Hendrick, 543 N.W.2d 217, 221-22 (N.D. 1996) (holding in enhancement case that court looks to totality of circumstances to assess waiver).

Fitzgerald v. State, 972 P.2d 1157, 1163-64 (Okla. 1998) (holding that under totality of circumstances, defendant's waiver was valid because he was aware of nature of charges, and range of punishments and that self-representation was "a bad decision").

State v. Cashman, 491 N.W.2d 462, 465 (S.D. 1992) (holding that dangers and disadvantages of self-representation are more obvious at a guilty plea to DUI since defendant is fully advised of charges, rights, and punishments).

Hatten v. State, 71 S.W.3d 332, 333-34 (Tex. Ct. Crim. App. 2002) ("dangers and disadvantages" warning inapplicable when defendant does not contest guilt to misdemeanor assault).

State v. Arguelles, 63 P.3d 731, 750 (Utah 2003) (for self-representation at penalty phase, court should advise of right to counsel, ascertain that defendant can comply with rules and recognizes that a defense is not simply matter of telling one's story, inform defendant of charges, and range of punishments).

Murphy v. State, 592 P.2d 1159, 1164 (Wyo. 1979) (upholding waiver where court informed defendant of right to appointed counsel and defendant asserted he understood what he was doing).

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(9)

No. 02-1541

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ of Certiorari to the Iowa Supreme Court

BRIEF FOR RESPONDENT

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Under the Sixth and Fourteenth Amendments to the United States Constitution, may the Iowa Supreme Court ensure a voluntary and intelligent waiver of counsel by requiring a district court to advise a pro se defendant who wishes to plead guilty of the usefulness of an attorney and the dangers of self-representation, specifying that an attorney may provide an independent opinion as to whether it is wise to plead guilty and that without an attorney the defendant may overlook a potential defense?

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IN THE

Supreme Court of the United States

No. 02-1541

STATE OF IOWA,
Petitioner,

v.

FELIPE EDGARDO TOVAR,
Respondent.

On Writ of Certiorari to the Iowa Supreme Court

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Felipe Tovar accepts Petitioner's statement of the facts and procedural posture as essentially correct, with two exceptions.

Petitioner states the District Court "commenced a guilty plea colloquy," and said to Tovar "I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?" Pet'r Br. 3. At the time the District Court noted Tovar waived application for a court appointed attorney, Tovar had not yet offered any plea. J.A. 8-9. The District Court did not begin the colloquy required for acceptance of guilty pleas until the District Court asked Tovar how he wished to plead and Tovar replied "Guilty." J.A. 9, 11. At no time from the initial offering of

Tovar's plea of guilty through the court's acceptance of the plea did the District Court specifically advise Tovar that he could have counsel present prior to and during entry of his guilty plea. J.A. 9-30.

Petitioner states it became clear that Tovar was not indigent when he was denied counsel at the sentencing hearing because he was dependent upon his parents. Pet'r Br. 7. Tovar disputes whether the District Court made an adequate inquiry into his indigency status.

SUMMARY OF ARGUMENT

Respondent Felipe Tovar and Petitioner agree on several points. Both agree Tovar had a constitutional right to counsel when he entered his 1996 guilty plea. Pet'r Br. 34-35. Both agree that to proceed without counsel, Tovar had to make a voluntary and intelligent waiver of his right to counsel. Pet'r Br. 13-15.

Tovar and Petitioner disagree as to what is required for a voluntary and intelligent waiver of counsel prior to and during entry of a guilty plea. Petitioner suggests the colloquy used for the acceptance of guilty pleas is sufficient to waive counsel. Pet'r Br. 23-25. Tovar asserts that the guilty plea colloquy is insufficient because it does not address the role an attorney could serve and the assistance he could provide prior to and during entry of the plea. Rather, a defendant should be advised that he has a right to an attorney and that by waiving an attorney he risks overlooking potential defenses and will lose an independent opinion as to the wisdom of pleading guilty. The judgment of the Iowa Supreme Court should be affirmed.

1. Under the Sixth and Fourteenth Amendments to the United States Constitution, criminal defendants in state proceedings are entitled to the assistance of counsel before imprisonment can be imposed. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 37

(1972); *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963). This right attaches to a guilty plea proceeding. *Rice v. Olson*, 324 U.S. 786, 788 (1945). Assistance of counsel at a guilty plea assists the defendant by providing him with an intelligent assessment of the relative advantages of pleading guilty and by protecting him from coercive conduct by the State. *Argersinger v. Hamlin*, 407 U.S. at 34; *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970).

Nonetheless, a defendant may proceed without counsel so long as he validly waives his right to counsel. Such a waiver must be a voluntary, knowing and intelligent act done with sufficient awareness of the relevant circumstances, the likely consequences, and the dangers of self-representation. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Brady v. United States*, 397 U.S. at 748. A court must make a thorough investigation regarding a defendant's waiver of counsel; it is not enough for a defendant to say he wishes to waive his right. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948). The waiver inquiry should take into consideration the purposes a lawyer can serve and the assistance he could provide to an accused at the stage of the proceedings for which the right to counsel is being waived. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

2. A guilty plea colloquy is not sufficient to advise a pro se defendant of his right to have counsel present prior to and during entry of his guilty plea. A guilty plea colloquy focuses on the nature of the charges, the potential punishments, and the trial rights a defendant waives by pleading guilty. *See* Iowa R. Crim. P. 2.8(2)(b) (2003). Pet. 3-4. It in no way informs a defendant of the right to plea counsel, or of the usefulness of plea counsel.

A separate yet brief discussion of the availability and usefulness of plea counsel will make defendants aware of their right to counsel prior to the entry of a guilty plea. This is particularly important for first-time misdemeanor defendants,

who may be completely unfamiliar with the legal system and unaware of their right to have counsel during plea proceedings.

The waiver discussion proposed by the Iowa Supreme Court complies with established precedent by considering the particular usefulness of counsel during plea proceedings. *Patterson v. Illinois*, 487 U.S. at 298. *See* Pet. App. 13-19. The Court recognized counsel's role at plea proceedings as "multi-faceted" and suggested that defendants seeking to waive plea counsel be advised that by doing so they risk losing an independent opinion as to their case and risk overlooking potential defenses. Pet. App. 15-19. Such a discussion would adequately inform a pro se defendant of the usefulness of counsel at plea proceedings and the dangers of proceeding without counsel.

3. The waiver discussion proposed by the Iowa Supreme Court would not unduly burden Petitioner's interest in punishing repeat offenders. It is well settled that Petitioner would not be able to use uncounseled convictions lacking a valid waiver of counsel for the purposes of sentencing enhancement. *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967). Nonetheless, Petitioner could arguably use such convictions as elements of later prosecutions, depending on the language of the applicable statute. *Lewis v. United States*, 445 U.S. 55, 65-67 (1980). Petitioner could also seek more severe sentences within the otherwise applicable sentencing range by presenting independent proof of the conduct underlying the uncounseled conviction. *Nichols v. United States*, 511 U.S. 738, 748 (1994).

The waiver discussion will not inhibit the plea process. Such a discussion will not prevent a defendant from entering a guilty plea, but will ensure that he is aware of his right to counsel before he does so.

Finally, the waiver discussion proposed by the Iowa Supreme Court will not unduly burden the prosecution of enhanced offenses. Unless a defendant is directly attacking his uncounseled conviction, the defendant will have the initial burden of showing that he was not represented by counsel and did not waive counsel. *Compare State v. Cooley*, 608 N.W.2d 9, 14 (Iowa 2000)(holding State has burden to show valid waiver of counsel on direct appeal) *with State v. Draper*, 457 N.W.2d 606, 610 (Iowa 1990)(holding defendant had obligation to raise prima facie case as to infirmity of prior conviction before burden would shift to State). On collateral review, a defendant seeking to challenge his conviction would have to establish the facts supporting the invalid waiver by a preponderance of the evidence. *Johnson v. Zerbst*, 304 U.S. 458, 468-49 (1938); *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977). Furthermore, the waiver colloquy proposed by the Iowa Supreme Court will assist Petitioner in the long term. If all courts follow this waiver discussion, there will be little question that a defendant was advised regarding the usefulness of plea counsel and the dangers of proceeding pro se.

ARGUMENT

I. THE RIGHT TO COUNSEL IS ESSENTIAL TO THE FUNDAMENTAL FAIRNESS OF CRIMINAL PROCEEDINGS AND THE RELIABILITY OF CRIMINAL CONVICTIONS.

A. The United States Supreme Court has long recognized the need for representation by counsel to ensure the fairness of criminal proceedings.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Prior to 1963, however, the

explicit protection of the Sixth Amendment was granted only to those defendants prosecuted under the federal system. *See Betts v. Brady*, 316 U.S. 455, 461-62 (1942)(declining to make the Sixth Amendment applicable to the States), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963).

Nonetheless, the United States Supreme Court recognized the importance of counsel to an accused and would sometimes extend the right to counsel to criminal defendants in state proceedings under the concept of due process. In analyzing a due process right to counsel, the Court looked at the totality of the circumstances, including the complexity of the charge and the age, background and education of the defendant. *See Betts v. Brady*, 316 U.S. at 462 ("Asserted denial is to be tested by an appraisal of the totality of facts in a given case); *Powell v. Alabama*, 287 U.S. 45, 60 (1932)(noting that defendants were "young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror").

In *Powell v. Alabama*, this Court stated that "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. at 68-69. Thus, due process required that an accused be given time and opportunity to secure counsel. *Id.* at 53. The Sixth Amendment, in particular, "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). The purpose of the Sixth Amendment is to protect defendants from convictions obtained based upon their "own ignorance of [their] legal and constitutional rights." *Id.* at 465.

In 1963, the right to assistance of counsel was recognized as a fundamental right and made applicable to the States via the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Considering the "vast sums of money" spent by governments to prosecute defendants and by defendants to hire lawyers, the *Gideon* Court proclaimed that "lawyers in criminal courts are necessities, not luxuries." *Id.* at 346.

Although *Gideon* dealt with a felony prosecution, the right to counsel is not limited to defendants charged with felonies. In *Argersinger v. Hamlin*, the right to counsel was extended to any criminal defendant facing imprisonment, regardless of whether the offense is classified as a felony or a petty offense. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The *Argersinger* Court was unconvinced that "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." *Id.* at 33. The Court was also concerned that the sheer volume of misdemeanor cases would create "an obsession for speedy dispositions, regardless of the fairness of the result." *Id.* at 34.

More recently, the right to counsel was extended to any offense in which a defendant received a suspended term of imprisonment. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002)(extending the actual imprisonment standard adopted in *Scott v. Illinois*, 440 U.S. 367 (1979)). In *Alabama v. Shelton*, this Court held that a suspended sentence could not be imposed against a defendant who was deprived of counsel during the underlying proceedings, as the proceedings had not been "subjected to 'the crucible of meaningful adversarial testing.'" *Id.* at 658, 667 (*quoting United States v. Cronic*, 466 U.S. 648, 656 (1984)).

B. The right to counsel is no less important to a defendant who ultimately chooses to plead guilty.

The right to counsel attaches at all critical stages of a criminal proceeding, from arraignment through sentencing. *Carter v. Illinois*, 329 U.S. 173, 174 (1946). This includes a guilty plea proceeding. *Boyd v. Dutton*, 405 U.S. 1, 2 (1972)(per curiam); *Rice v. Olson*, 324 U.S. 786, 788 (1945). Where the assistance of counsel is constitutionally required, a defendant does not have to make a specific request for counsel. *Carnley v. Cochran*, 369 U.S. 506, 513 (1962).

This Court has addressed the particular usefulness of counsel at plea proceedings. "A plea of guilty is different in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction." *Kercheval v. United States*, 274 U.S. 220, 223 (1927). The determination of guilt can be a complex legal task even for an educated and intelligent layperson. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). The issue of guilt may turn on the legal construction of a statute, rather than admitted facts. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 285 (1942) (Douglas, J., dissenting). "[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970). An accused is entitled to rely on counsel to make an independent examination of the facts, circumstances and law and to offer an informed opinion as to which plea should be entered. *Von Moltke v. Gillies*, 332 U.S. at 721. Sometimes, only the presence of counsel can enable a defendant to "know all the defenses available to him and to plead intelligently." *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961). "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify." *Tomkins v. Missouri*, 323 U.S. 485, 489 (1945).

The provision of counsel during a guilty plea also protects a defendant from coercive conduct by the prosecution. "Counsel is needed [at a plea proceeding] so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972). Particularly with misdemeanor offenses, where the desire for speedy dispositions may taint the fairness of the result, the presence of counsel may have a dramatic impact on the result of the proceedings. *Id.* at 34, 37 (citing study that found misdemeanants represented by counsel were five times more likely to get their charges dismissed than were pro se defendants). A trial judge cannot effectively discharge the role of both judge and defense counsel. *Carnley v. Cochran*, 369 U.S. 506, 510 (1962).

The importance of counsel at plea proceedings was perhaps most cogently explained in *Williams v. Kaiser*:

> The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.

Williams v. Kaiser, 323 U.S. 471, 475-76 (1945)(citations omitted).

C. Nonetheless, a defendant may proceed without counsel so long as he voluntarily and intelligently waives his right to counsel.

Although an accused is entitled to the assistance of counsel at every critical stage of a criminal proceeding, an accused may choose to voluntarily and intelligently waive his right to counsel. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942). Such a waiver must be a voluntary, knowing, and intelligent relinquishment of a known right or privilege done with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Schneckloth v. Bustamonte*, 412 U.S. 218, 243-44 (1973); *Brady v. United States*, 397 U.S. 742, 748 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). An accused must be made aware of the dangers of self-representation so that the record establishes he knows what he is doing "'with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975). A judge has a duty to "investigate as long and as thoroughly as the circumstances of the case before him demand"; it is not enough for an accused to say that he has been informed of his right to counsel and wishes to waive it. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948). A waiver of rights should appear in the court record; courts will indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. at 464-65. An invalid waiver of counsel is akin to a denial of counsel. *Walker v. Johnston*, 312 U.S. 275, 286 (1941).

In *Patterson v. Illinois*, the United States Supreme Court suggested that courts should take a pragmatic approach toward the waiver of counsel. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988). The waiver inquiry must take into consideration "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage" before

a waiver will be recognized. *Id.* The Court defined "the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Id.*

In *Patterson*, the question was whether the accused was made "sufficiently aware of his right to have counsel present during [post-indictment] questioning, and of the possible consequences of a decision to forgo the aid of counsel." *Id.* at 292-93. Because the role of counsel at postindictment questioning is "rather unidimensional", *Miranda* warnings were sufficient to advise the defendant of the dangers of self-representation. *Id.* at 294. The *Patterson* Court recognized, however, that "an attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phases of the criminal proceedings." *Id.* at 294 n.6.

Under *Patterson*, the nature of the colloquy a court must use to ensure a defendant voluntarily and intelligently waives counsel will change with the stage of the proceedings. The advice given to a defendant seeking to waive counsel at post-indictment questioning will not be the same advice given to a defendant seeking to waive counsel at trial, because the role of counsel at those proceedings is different. So, too, is the role of counsel at a guilty plea proceeding.

II. CONTRARY TO PETITIONER'S ASSERTION, A GUILTY PLEA COLLOQUY, STANDING ALONE, IS NOT SUFFICIENT TO ENSURE A VOLUNTARY AND INTELLIGENT WAIVER OF PLEA COUNSEL.

A. A guilty plea colloquy focuses on the trial-related rights a defendant waives by pleading guilty, and gives no attention to the right to have counsel at the plea proceeding.

A guilty plea waives certain constitutional rights, including the right against selfincrimination, the right to a jury trial, and the right to confrontation. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). It also waives the right to contest the government's evidence. *McMann v. Richardson*, 397 U.S. 759, 766 (1970). All of these rights are associated with trial and have little to do with advising a criminal defendant of the usefulness of plea counsel.

Likewise, the colloquy used to accept Tovar's guilty plea focused on his understanding of the trial rights he was waiving by pleading guilty and did not suffice to waive plea counsel. The plea colloquy used by the District Court complied with the colloquy for acceptance of guilty pleas outlined in Iowa Rule of Criminal Procedure 8(2)(b) (1992).[1] Pet'r Br. App. 1-2. Pursuant to the Rule, the District Court informed Tovar of the nature of the charge, the mandatory minimum and maximum possible punishment, the right to trial by jury, the right to assistance of counsel at trial, the

[1] The Iowa Rules of Criminal Procedure were renumbered after Tovar's 1996 guilty plea. The requirements of a guilty plea colloquy can now be found at Iowa Rule of Criminal Procedure 2.8(2)(b) (2003). *See* Pet. 3-4. Substantial compliance with the colloquy, not strict compliance, is required. *State v. Myers*, 653 N.W.2d 574, 578 (Iowa 2002)(felony guilty plea); *State v. Yarborough*, 536 N.W.2d 493, 496 (Iowa Ct. App. 1995)(misdemeanor guilty plea).

right to confront and cross-examine witnesses, the right against self-incrimination, and the right to present and compel witnesses in his defense. J.A. 12-20; Pet'r Br. App. 1-2. In addition, the District Court was required to advise Tovar that by pleading guilty he was waiving his right to a trial. J.A. 19; Pet'r Br. App. 2.

This colloquy provided Tovar with no discussion of the right to plea counsel and instead focused squarely on the trial rights Tovar waived by pleading guilty and the potential punishment he faced. The only discussion of the right to counsel was in the context of waiving counsel "at that trial." J.A. 16. In fact, at no time did the District Court specifically advise Tovar that he had a right to plea counsel, that plea counsel could be appointed for him if he were unable to hire an attorney,[2] and that plea counsel could be present prior to and during the entry of the guilty plea. The District Court did not engage Tovar in any meaningful discussion of the usefulness of plea counsel, nor did it advise Tovar of the

[2] Petitioner and *amicus* National District Attorneys Association appear to believe that Tovar's status as a non-indigent is of some relevance. Pet'r Br. 13; NDAA Amicus Brief i. First, Tovar questions his status as a non-indigent, given that he was denied counsel as an adult based upon his parent's support. J.A. 46. Second, the District Court seems to have given no consideration to any "substantial hardship" the denial of counsel may have caused, which could have allowed Tovar to be considered an "indigent" under Iowa law. Iowa Code § 815.9(1)(c) (1995). Resp't Br. App. 1. The statute also allowed the court to appoint counsel for Tovar if he was not indigent, wanted counsel, but refused to hire an attorney. Iowa Code § 815.10(2) (1995 Supp.). Resp't Br. App. 2. Third, Tovar's financial status was not addressed by the District Court until sentencing on the guilty plea. J.A. 46. Finally, the Sixth Amendment provides a constitutional right to assistance of counsel to all criminal defendants, not just those who need court-appointed counsel, and thus the advice given to criminal defendants would be the same in either circumstance. *See Wheat v. United States*, 486 U.S. 153, 159 (1988)(recognizing Sixth Amendment right to retain an attorney).

consequences of proceeding without counsel, as opposed to the consequences of merely pleading guilty.

B. Advising a defendant of the relevant circumstances and likely consequences of pleading guilty does not advise a defendant of his right to plea counsel, the usefulness of plea counsel, and the dangers of proceeding without plea counsel.

Petitioner mixes apples with oranges. Petitioner suggests that as long as Tovar was aware of the adverse consequences of pleading guilty without counsel—namely, that he faced certain conviction resulting in a set range of punishment—then Tovar had sufficient awareness of the relevant circumstances and ultimate consequences to create a valid waiver of plea counsel. Pet'r Br. 20, 24-25.

Petitioner essentially asks this Court to abolish the right to counsel for guilty pleas. If a guilty plea colloquy is sufficient to advise a pro se defendant of his right to plea counsel, then a court need never advise a defendant that he has a right to plea counsel or that if he cannot afford plea counsel, counsel would be appointed for him. All a court need do is follow the colloquy, focusing though it does on trial-related rights. The mere voluntary entry of the guilty plea would be enough to assume a valid waiver of plea counsel.

Unquestionably, a defendant has a right to be represented by counsel at a plea proceeding. *Boyd v. Dutton*, 405 U.S. 1, 2 (1972)(per curiam). To proceed pro se, a defendant must voluntarily and intelligently waive his right to plea counsel. Id. at 2-3. A waiver of counsel will not be presumed from an uncounseled defendant's appearance and plea of guilty. *Carnley v. Cochran*, 369 U.S. 506, 515-16 (1962). *But see Carter v. Illinois*, 329 U.S. 173, 176-77 (1946)(holding unchallenged finding that defendant pleaded guilty after a full apprisal of his rights). Nor is it enough for a defendant to say

he has been informed of his right to counsel and wishes to waive it. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948). Rather, under *Patterson v. Illinois*, a valid waiver of plea counsel must address "the purposes a lawyer can serve" at the plea proceedings and "what assistance he could provide to an accused" at the plea proceeding. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

The plea colloquy used by the District Court did not satisfy these minimum requirements. Petitioner implies that no such discussion was necessary because the usefulness of plea counsel is merely "subsidiary information." *See* Pet'r Br. 18-19 (noting case law does not permit invalidation of guilty pleas based upon a defendant's ignorance of subsidiary information). Information regarding the right to counsel, the usefulness of counsel, and the dangers of self-representation is not "subsidiary." It is required for an intelligent and voluntary waiver of counsel. *Patterson v. Illinois*, 487 U.S. at 298; *Faretta v. California*, 422 U.S. 806, 835 (1975).

C. The need for a separate discussion regarding the right to plea counsel is especially important for those unfamiliar with the legal system.

The need for a brief yet specific discussion of the right to plea counsel is perhaps even more important given that many guilty pleas are likely to involve first-time offenders facing misdemeanor charges. *See, e.g., Sourcebook of Criminal Justice Statistics Online 2001*, http://www.albany.edu/sourcebook/1995/pdf/t518.pdf, Table 5.18 (showing 54.9 percent of misdemeanor defendants convicted in U.S. District Courts had no prior convictions). These defendants may have little understanding of their right to plea counsel. They may be under a mistaken belief that they have a right to counsel if they proceeded to trial, but not if they wished to enter a guilty plea. The waiver discussion advanced by the Iowa Supreme Court would resolve this dilemma.

Tovar's case is a prime example of the need for a discussion of the right to counsel. Tovar did not merely appear for a pre-scheduled guilty plea proceeding. Rather, Tovar appeared for arraignment and chose to plead guilty at the arraignment. J.A. 8-9. At the time the District Court noted Tovar was appearing without counsel and asked Tovar if he wished to represent himself at the hearing, the District Court had no way of knowing whether Tovar intended to plead guilty or not guilty. Once Tovar stated his intent to plead guilty, the District Court did not advise Tovar that he had a right to plea counsel. J.A. 9-30. Tovar, like many first-time offenders, may have been under the mistaken belief that he had a right to counsel at trial, but not if he was merely going to plead guilty. Nothing in the District Court's discussion with Tovar would have dissuaded him from such a belief. The Court did not even inquire into whether Tovar was able to hire an attorney or why he did not want one. *See Von Moltke v. Gillies*, 332 U.S. 708, 718 (1948)("The judge appears not to have asked petitioner whether she was able to hire a lawyer, why she did not want one, or who had given her advice in connection with her plea").

In *Miranda v. Arizona*, this Court recognized that a warning advising a defendant of his right to remain silent makes a defendant aware of this right, "the threshold requirement for an intelligent decision as to its exercise." *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966). To be valid, however, the warning also had to advise a defendant not only of the right, but of the consequences of waiving it. *Id.* at 469. The *Miranda* Court recognized that any examination of a defendant's "age, education, intelligence or prior contact with authorities" can never be more than "speculation" when it comes to assessing a waiver of constitutional rights. *Id.* at 468-69. "[A] warning is a clearcut fact." *Id.* at 469. "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel." *Id.* at 470-71.

Where defendants are unfamiliar with the legal system, yet face the potential for the deprivation of liberty, it is incumbent upon a trial or plea court to ensure they are adequately informed of their constitutional right to counsel and make a voluntary and intelligent decision to waive their right if they choose to do so. The waiver discussion proposed by the Iowa Supreme Court fulfills these goals so that no one need speculate whether a pro se defendant who ultimately pleaded guilty validly waived his right to counsel.

D. The Iowa Supreme Court's decision complied with the requirements of Patterson by specifically addressing the usefulness of counsel at a plea proceeding when analyzing the sufficiency of Tovar's purported waiver of counsel.

In its decision, the Iowa Supreme Court held that "a defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel." Pet. App. 18. This advice, according to the Iowa Supreme Court, should consist of advising the defendant: "generally that there are defenses to criminal charges that may not be known to laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked"; "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty"; and regarding "the nature of the charges against him and the range of allowable punishments." Pet. App. 18. The Iowa Supreme Court specified that the trial judge was not to assume the role of an attorney and was not expected to discuss particular defenses with an accused. Pet. App. 18.

The decision of the Iowa Supreme Court followed the rationale of *Patterson* by considering the usefulness of counsel *at the plea proceeding*. *See Patterson v. Illinois*, 487 U.S. 285, 298 (1988)(holding that stage of proceedings is factor relevant to waiver inquiry). It held that "the discussion between Tovar and the court with respect to the usefulness of counsel at trial did not suffice to advise Tovar of the usefulness of counsel at the plea stage." Pet. App. 16. The Iowa Supreme Court specifically found that there was an "absence of any dialogue concerning the value of having an attorney when pleading guilty," that the trial court failed to alert Tovar to the dangers of entering a guilty plea without the advice of counsel, and that the court did not warn Tovar of the availability of legal defenses that "he, as a layperson, would not recognize." Pet. App. 16.

Instead of characterizing an attorney's role at a plea proceeding as unidimensional—advising a defendant whether to plead guilty or not guilty—the Iowa Supreme Court described the attorney's role as "multi-faceted." Pet. App. 15. "A lawyer will know what defenses might be available to the crime charged" and "what questions to ask to deter mine whether such defenses might be factually viable." Pet. App. 15.

Nor was the Iowa Supreme Court convinced that an attorney was of less use in an OWI case, where the concept of driving while intoxicated could be readily understood by non-lawyers. The Iowa Supreme Court recognized that the average layperson would likely be unaware of the proper procedures for invoking implied consent or grounds for suppressing evidence, "which is usually the only meaningful defense available." Pet. App. 15.

The Iowa Supreme Court's rationale with respect to the "simplicity" of the charge finds support in various United States Supreme Court decisions regarding the importance of counsel in misdemeanor cases. This Court has recognized that

the legal and constitutional questions involved in misdemeanor cases are no less complex simply because the charges are misdemeanors. *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972). Also, the volume of misdemeanor cases "may create an obsession for speedy dispositions, regardless of the fairness of the result." *Id.* In such cases, the presence of counsel may dissipate the coercive pressure to plead guilty. *Nichols v. United States*, 511 U.S. 738, 763 (1994).

The decision of the Iowa Supreme Court did not treat the Sixth Amendment right to counsel with mechanical rigidities, but addressed the particular concerns of the right to counsel at the plea proceeding.

III. THE DECISION OF THE IOWA SUPREME COURT WILL NOT HAVE A SUBSTANTIALLY ADVERSE IMPACT ON THE GOVERNMENT'S ABILITY TO PUNISH CRIMINAL OFFENDERS.

A. Although Petitioner does have an interest in punishing repeat offenders, enforcement of recidivist statutes may not circumvent the right to counsel.

Tovar agrees that Petitioner has a valid interest in punishing recidivists. *See generally, e.g., Ewing v. California*, 538 U.S. 11 (2003)(upholding California's three-strikes law against Eighth Amendment challenge and recognizing governmental interest in deterring recidivism). Nonetheless, this Court's precedent also clearly establishes that a government's interest in punishing recidivists should not compromise the fundamental right to counsel.

In *Burgett v. Texas*, this Court held that a conviction obtained in violation of the Sixth Amendment could not be used to either "support guilt or enhance punishment for another offense." *Burgett v. Texas*, 389 U.S. 109, 114-15

(1967). *But see Lewis v. United States*, 445 U.S. 55, 65-67 (1980)(holding uncounseled felony conviction obtained in violation of Sixth Amendment could be used in prosecution of defendant as felon in possession of firearm). The later use of such a conviction would erode the principle of *Gideon v. Wainwright* and allow a defendant to suffer anew from the deprivation of his Sixth Amendment right. *Burgett v. Texas*, 389 U.S. at 115. *See also United States v. Tucker*, 404 U.S. 443, 447-49 (1972)(holding sentencing judge could not impose harsher sentence based upon two convictions that were "wholly unconstitutional" under *Gideon*).

"Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a . . . court's authority to deprive an accused of his life or liberty." *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938). This Court has repeatedly recognized that convictions obtained in violation of the right to counsel, whether they result from outright denial of counsel or an invalid waiver of counsel, are unreliable, cannot be used to enhance sentences, and are subject to collateral attack. *See, e.g., Daniels v. United States*, 532 U.S. 374, 382 (2001)(recognizing right of collateral attack on prior convictions in habeas based upon *Gideon* violation); *Custis v. United States*, 511 U.S. 485, 496 (1994)(recognizing right to collaterally attack prior convictions based upon denial of appointed counsel); *Parke v. Raley*, 506 U.S. 20, 27 (1992)(recognizing uncounseled convictions cannot be used to support guilt or enhance punishment); *Loper v. Beto*, 405 U.S. 473, 483 (1972) (prohibiting use of prior convictions for impeachment purposes where defendant had been denied counsel); *United States v. Tucker*, 404 U.S. 443, 445, 448-49 (1972)(reversing sentence made more severe by court's consideration of defendant's prior uncounseled convictions where he had not been advised of counsel and had not waived counsel).

Of particular interest in Tovar's case is that the use of his prior uncounseled guilty plea would raise his present offense from an aggravated misdemeanor to a class D felony. *See* Iowa Code § 321J.2(2)(b)-(c) (1999).[3] Pet. 3. This Court has previously approached the issue of elevating misdemeanor offenses into felonies via uncounseled convictions with some concern. Justice Marshall's concurring opinion in *Baldasar v. Illinois* expressed concern that an uncounseled conviction was used to elevate an offense permitting no more than one year in jail "into a felony, with all the serious collateral consequences that a felony conviction entails." *Baldasar v. Illinois*, 446 U.S. 222, 227 (1980)(Marshall, J. concurring), *overruled by Nichols v. United States*, 511 U.S. 738, 749 (1994). Other cases have paid some attention to whether the uncounseled prior conviction changed the applicable sentencing range for the later offense. *See, e.g., Lackawanna County Dist. Atty. v. Coss*, 532 U.S. 394, 406-07 (2001) (holding that sentence was not "actually increased" by consideration of prior convictions); *Daniels v. United States*, 532 U.S. 374 (2001)(Souter, J. dissenting) (questioning why a defendant should be subjected to a higher sentencing range under the Armed Career Criminal Act); *Nichols v. United States*, 511 U.S. 738, 751 (Souter, J. concurring)(noting prior convictions did not play a conclusive role in choosing a sentencing range under the federal sentencing guidelines as a judge could allow a downward departure). In Tovar's case, the use of his prior uncounseled guilty plea would be conclusive; it would conclusively elevate his offense from an aggravated misdemeanor to a class D felony. Iowa Code § 321J.2(2)(b)-(c) (1999 Supp.). Pet. 3. It would conclusively elevate the applicable sentencing range from a range of from

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[3] Although Petitioner cited the 2001 Iowa Code section, Tovar was actually charged under the 1999 Supplemental Code. Pet. 3; Pet. App. 38-41. This typographical error is of little relevance, though, given that the language of the statutes are identical.

seven days to two years imprisonment for an aggravated misdemeanor to a range of from 30 days to five years imprisonment for a class D felony. *Id.; id.* §§ 902.9(5), 903.1(2). Resp't Br. App. 2-3. In such cases, the reliability of the previous conviction should be of utmost importance, as the consequences of the earlier deprivation of counsel are severe.

B. Uncounseled convictions could still be used in the prosecution of offenses.

Although Petitioner would be barred from using uncounseled convictions for sentencing enhancements if counsel was not validly waived, Petitioner may still prosecute offenses where the uncounseled conviction would be an element of the offense. In *Lewis v. United States*, this Court held that a prior uncounseled felony conviction obtained in violation of the Sixth Amendment could be used as the basis for a later prosecution of the same defendant as a felon in possession of a firearm. *Lewis v. United States*, 445 U.S. 55, 65-67 (1980). Depending on the language of the applicable statute,[4] an uncounseled conviction obtained in violation of the Sixth Amendment may still be viable for a later prosecution. In such cases, Petitioner's interest in prosecuting repeat offenders is protected.

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[4] The *Lewis* Court took notice of the fact the relevant federal firearms statute contained no language excepting from its prohibitions felons whose convictions might ultimately turn out to be constitutionally invalid. *Lewis v. United States*, 445 U.S. 55, 61-62 (1980).

Under Iowa law, a defendant's previous OWI convictions are not considered "elements" of a later enhanced OWI prosecution. *State v. Talbert*, 622 N.W.2d 297, 301 (Iowa 2001). Thus, *Lewis* would not permit the use of Tovar's 1996 guilty plea to enhance his current offense.

C. Arguably, Petitioner may also attempt to prove up the conduct underlying the uncounseled conviction in seeking a harsher sentence within the applicable sentencing range.

Tovar agrees that sentencing courts have great discretion and may rely on a wide range of information in determining a defendant's sentence. *United States v. Watts*, 519 U.S. 148, 151-52 (1997); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994); *Williams v. New York*, 337 U.S. 241, 246-47 (1949). In fact, a sentencing court may even consider conduct for which a defendant has been acquitted, so long as it is proven by a preponderance of the evidence. *United States v. Watts*, 519 U.S. at 156 (considering a sentence under the federal sentencing guidelines).

A conviction obtained in violation of the Sixth Amendment is facially unreliable for the purposes of enhancing punishment. *United States v. Tucker*, 404 U.S. 443, 447, 449 (1972). Even so, this would not necessarily prevent Petitioner from seeking harsher punishment within the applicable sentencing range if it could prove up the conduct underlying the otherwise invalid conviction through other, independent means. *See e.g., Nichols v. United States*, 511 U.S. at 748 ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense"). Iowa courts, for example, recognize that evidence of other criminal activity may be used in determining a defendant's sentence, so long as there is a sufficient record to establish the matters relied upon. *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000).

In this case, Petitioner cannot use Tovar's previous uncounseled guilty plea to raise the level of his offense from an OWI 2nd, a misdemeanor, to an OWI 3rd, a felony. Petitioner could, however, provide separate evidence of Tovar's conduct underlying his prior uncounseled conviction

to seek more severe punishment under the OWI 2nd sentencing range. For example, Petitioner could seek to introduce the trial information, minutes of testimony, blood alcohol test results, or an officer's affidavit or testimony at the sentencing hearing. *See e.g., State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998)(allowing sentencing court to consider pre-sentence investigation report that listed counseling for a previous incident of sex abuse where defendant did not challenge the report). Thus, even though Petitioner would be prevented from using the fact of Tovar's unreliable conviction to enhance his sentence, it still has means by which it could seek to punish Tovar more severely based upon independent proof of the underlying conduct. In this respect, Petitioner's interest in deterring and punishing repeated criminal conduct is preserved.

D. The waiver discussion proposed by the Iowa Supreme Court will not inhibit the plea process.

The decision of the Iowa Supreme Court will not inhibit the plea process. At most, it may take the plea court a few minutes to address a defendant and advise him of the usefulness of an attorney and the consequences of proceeding pro se, in addition to the colloquy already required for acceptance of the plea. This concern is further alleviated in misdemeanor cases, where the plea court may also accept a written plea of guilty and waiver of rights from a defendant pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b) (2003). Pet. 3-4. If the waiver of counsel at the plea proceeding additionally appears in the written plea form and waiver of rights, it will not take a significant amount of time for the court to review the plea and waiver form personally with a defendant.

Furthermore, the argument that such a waiver discussion would "discourage the ready, unqualified admission of guilt" actually supports the need for such a discussion. Pet'r Br. 33.

If Petitioner is concerned that something the court says to a defendant will persuade him to reconsider his plea, then it is obviously information that a defendant believes is relevant to his decision-making process.

Tovar agrees that there are many reasons why an uncounseled defendant may wish to enter a guilty plea pro se. Pet'r Br. 32-33. Ignorance of his constitutional right to counsel, however, should not be one that is condoned by the courts. Nothing in the waiver discussion adopted by the Iowa Supreme Court would prevent a defendant who wants to "expeditiously accept responsibility" for his offense from doing so. Pet'r Br. 32. It would merely ensure that such a defendant was aware of the constitutional right to assistance of counsel prior to and during the entry of his guilty plea. "Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen." *Williams v. Kaiser*, 323 U.S. 471, 476 (1945).

E. Petitioner exaggerates the burden the Iowa Supreme Court's decision will have on prosecution of enhanced offenses.

The decision of the Iowa Supreme Court will not create an undue burden for prosecutors. The practical difficulty of obtaining the court record of the previous proceeding is not as significant when the misdemeanor plea has been entered with the addition of a written plea and waiver of rights pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b).[5] In these cases,

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[5] Some of the other jurisdictions allowing a guilty plea to be entered, in whole or in part, via a written plea and waiver of rights include Alabama, Colorado, Hawaii, Idaho, Indiana, Iowa, Louisiana, Michigan, Minnesota, Nebraska, Nevada, Pennsylvania, Texas and West Virginia. N.C. Gen. Stat. § 7A-457 (2003); W. Va. Code § 62-3-1a (2003); Ala. R. Crim. P. 14.4(a) (2003); Colo. R. Crim. P. 11(c) (1998); Haw. R. Crim. P. 43(c)(6) (2003); Idaho R. Misd. 6(a)(3) (2003); Mich. R. Crim. P. 6.610(D)(3) (2003); Minn. R. Crim. P. 5.02(1)(3)-(4) (2003); Nev. 2nd Judicial Dist.

the waivers will appear in the court record, which is easily accessible. Although there may be more difficulty in obtaining a transcript, it is far from an impossibility. The transcript of Tovar's 1996 guilty plea and sentencing was, for example, made part of the record during his 2001 felony case. J.A. 6-56.

Notably, many enhancement offenses specify a time frame under which a previous conviction would qualify for enhancement. Under Iowa law, a previous conviction for domestic assault, for example, would not qualify to enhance a current offense if the previous conviction occurred more than six years prior to the current offense. Iowa Code § 708.2A(5)(a) (2003). A previous conviction for harassment would not qualify as an enhancing offense if it occurred more than 10 years prior to the current offense. *Id.* § 708.7(2)-(3). The Operating While Intoxicated chapter under which Tovar was convicted limits the enhancement timeline to previous OWI offenses occurring no more than 12 years prior to the current offense. *Id.* §§ 321J.2(4)(a), 321.12(4). With respect to these offenses, the risk that prosecutors would be unable to obtain the necessary record is minimal.

The Iowa Rules of Criminal Procedure provide that prior to sentencing on an enhanced offense, a defendant may object to the use of a prior uncounseled conviction on the ground he did not validly waive counsel. Iowa R. Crim. P. 2.19(9) (2003). Resp't Br. App. 3. Unless a defendant is directly attacking his uncounseled conviction, the defendant will have the initial burden of showing that he was not represented by counsel and did not waive counsel. *Compare State v. Cooley*, 608 N.W.2d 9, 14 (Iowa 2000)(holding State has burden to

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Crim. R. 4(a) (2003); Pa. R. Crim. P. 550 (c) (2003); *Saylor v. State*, 335 N.E.2d 826 (Ind. 1975); *State v. Guidry*, 709 So.2d 233 (La. 1998); *State v. Werner*, 600 N.W.2d 500 (Neb. 1999); *Hatten v. Texas*, 89 S.W.3d 160 (Tex. 2002).

show valid waiver of counsel on direct appeal) *with State v. Draper*, 457 N.W.2d 606, 610 (Iowa 1990)(holding defendant had obligation to raise prima facie case as to infirmity of prior conviction before burden would shift to State) and *State v. Nelson*, 234 N.W.2d 368, 375 (Iowa 1975)(same). On collateral review, a defendant seeking to challenge his conviction would have to establish the facts supporting the invalid waiver by a preponderance of the evidence. *Johnson v. Zerbst*, 304 U.S. 458, 468-49 (1938); *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977). *See also Parke v. Raley*, 506 U.S. at 31 (holding it appropriate to place burden of proof on a defendant seeking to collaterally attack a prior conviction). In these instances, where a defendant has the initial burden of supporting the infirmity of his prior conviction, the burden on prosecutors is minimal.

Finally, the waiver discussion indicated by the Iowa Supreme Court would actually assist Petitioner in the long run. If all courts were to follow the proposed waiver discussion at plea proceedings, there would be little question that a defendant was adequately advised and made aware of his right to counsel at the plea proceeding. By making a record of its waiver discussion with a defendant, a court would facilitate its own determination of the voluntary and knowing character of the waiver and also facilitate any determination of the issue in later challenges to the proceedings. *McCarthy v. United States*, 394 U.S. 459, 467 (1969). If defendants proceed to plead guilty after being advised of the usefulness of counsel at the plea stage and the consequences of proceeding without counsel at the plea stage, then the presumption is that they elected to plead guilty with "eyes open." *Adams v. United States ex rel McCann*, 317 U.S. 269, 279 (1943).

The Sixth Amendment was designed to protect an accused's rights to counsel and to a fair trial, not to ease the burden on prosecutors seeking convictions. *See Powell v.*

Alabama, 287 U.S. 45, 61-64 (1932)(discussing the history of the right to counsel in England and the colonies, and quoting an historical treatise that found the English common law practice of denying counsel to felony defendants was an expedient means for convicting the accused). The Iowa Supreme Court's decision is consistent with the intent of the Sixth Amendment and will not create undue hardship in the prosecution of offenses.

CONCLUSION

For all of the reasons discussed above, Respondent Felipe Tovar respectfully requests this Court affirm the decision of the Iowa Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX

Iowa Code § 815.9 (1995)

1. For purposes of this chapter, section 68.8, section 222.22, chapter 232, chapter 814, and the rules of criminal procedure, the following apply:

a. A person is indigent if the person has an income level at or below one hundred fifty percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States department of health and human services.

b. A person is not indigent if the person has an income level greater than one hundred fifty percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States department of health and human services.

c. A person with an income level greater than one hundred fifty percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States department of health and human services may be deemed partially indigent by the court pursuant to a written finding that, given the person's circumstances, not appointing counsel at public expense would cause the person substantial hardship. However, the court shall require a person deemed partially indigent to contribute to the cost of representation in accordance with rules adopted by the state public defender.

Iowa Code § 815.10 (1995 Supp.)

* * *

2. If a court finds that a person desires legal assistance and is not indigent, but refuses to employ an attorney, the court shall appoint a public defender or another attorney to represent the person at public expenses. If an attorney other than a public defender is appointed, the fee paid to the attorney shall be taxed as a court cost against the person.

Iowa Code § 902.9 (1999 Supp.)

The maximum sentence for any person convicted of a felony shall be that prescribed by statute or, if not prescribed by statute, if other than a class "A" felony shall be determined as follows:

* * *

5. A class "D" felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars. A class "D" felon, such felony being for violation of section 321J.2, may be sentenced to imprisonment for up to one year in the county jail.

Iowa Code § 903.1 (1999 Supp.)

* * *

2. When a person is convicted of an aggravated misdemeanor, and a specific penalty is not provided for, the maximum penalty shall be imprisonment not to exceed two years. There shall be a fine of at least five hundred dollars but not to exceed five thousand dollars. When a judgment of conviction of an aggravated misdemeanor is entered against any person and the court imposes a sentence of confinement for a period of more than one year the term shall be an indeterminate term.

Iowa Rule of Criminal Procedure 2.19(9) (2003)

After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel. . . .

Supreme Court, U.S.
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No. 02-1541

In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Iowa

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. A GUILTY PLEA COLLOQUY CONVEYS SUFFICIENT INFORMATION TO ALLOW A DEFENDANT TO ACT WITHOUT A LAWYER; THE SIXTH AMENDMENT DOES NOT REQUIRE A SEPARATE LITANY EMPHASIZING THE ADVANTAGES OF AN ATTORNEY TO WAIVE THE ASSISTANCE OF COUNSEL.

The parties appear to agree that knowledge of "relevant circumstances and likely consequences" forms the touchstone for waivers of counsel at a guilty plea. *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 748 (1970); Resp. Br. 10. Tovar asserts, incorrectly however, that the Sixth Amendment requires the litany crafted by the Iowa Supreme Court to ensure knowledge of the right to, the usefulness of, and the dangers of forgoing plea counsel. Resp. Br. 12-17; *see also* Br. of *amicus* National Association of Criminal Defense Lawyers 5-12 (NACDL). The Iowa Supreme Court held the Sixth Amendment requires plea courts to advise defendants there are defenses generally unknown to lay persons, the danger in waiving counsel is that a viable defense will be overlooked, and without consulting an attorney a defendant loses an independent opinion on the wisdom of pleading guilty. Pet. for *Certiorari* App. 18 (Pet. App.). Principle and precedent do not support this conclusion.

A. The modern plea colloquy alerts a defendant about the areas which an attorney would advise: the evidence, the decision to plead guilty, and the sentence.

This Court has not held that the validity of the waiver of counsel turns on an explanation of the role a lawyer

plays in any particular stage of the proceedings, except arguably insofar as advising a defendant of an attorney's superior ability with respect to trial procedure. *Compare Patterson v. Illinois*, 487 U.S. 285, 293-94 (1988) *with Faretta v. California*, 422 U.S. 806, 808 n.2, n.3, 835 (1975). Neither does this Court's plurality decision in *Von Moltke v. Gillies* compel a discussion of the role of plea counsel. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948). *Von Moltke* turned as much on the plea court's failure to examine the factual basis for the plea as it did on the defendant's misunderstanding of what made her guilty. *Id.* at 727-28, 729 n.1.

Rather, this Court has held that a statement of the ultimate adverse consequence of waiver at the proceeding informs a defendant of an attorney's usefulness and the dangers and disadvantages of proceeding alone. *Patterson*, 487 U.S. at 293-94. Modern plea colloquies such as Iowa Rule of Criminal Procedure 2.8(2)(b) or Federal Rule of Criminal Procedure 11(b) serve that function.

From the plea colloquy, the defendant knows the direct consequences of pleading guilty without counsel; the range of punishment and that sentencing is in the judge's hands alone. Pet'r Br. App. 1-2; J.A. 20-21. The defendant knows that to stand without counsel and plead guilty means losing the advantages of fair trial guarantees, including the presumption of innocence and the availability of compulsory process. *See* Pet'r Br. App. 1-2; J.A. 15-19. Fully informed of the charge and its punishment, the defendant knows the admission will lead to conviction. The defendant further knows he is forgoing a challenge to the elements or the evidence supporting them – and what exactly the State's evidence would show. Pet'r. Br. 1; J.A. 23-24.

Since neither the decision to waive counsel nor the choice to plead guilty is final until the end of the hearing, the defendant knows generally what an attorney would advise him about: the evidence supporting guilt, the decision to plead guilty, and the likely sentence. *See* J.A. 9, 19, 27-28 (court asking defendant what plea he wished to enter and later asking twice more if that was still his desire).

B. The specific litany devised by the Iowa Supreme Court is not necessary to appreciate the procedural functions of counsel at a plea hearing.

Tovar and the NACDL also miss the mark in their proposition that the Sixth Amendment requires the litany crafted below because a layperson often does not fathom the role of counsel. Resp. Br. 15, 20-21; Br. for *amicus* NACDL 5-10. While some people may not know *how* lawyers serve their clients, a reminder of this fact is neither required by the Sixth Amendment nor necessary to ascertain a valid waiver of counsel.

Criminal defense attorneys serve procedural and substantive functions. Lawyers can manage the criminal proceedings so that their clients are not prejudiced by, for example, poorly lodged or miss-timed evidentiary objections, biased jurors, or improper sentencing factors. The most procedurally demanding setting – a trial – suggests a detailed waiver colloquy over the "dangers and disadvantages" of conducting one's own trial makes sense. *Faretta*, 422 U.S. at 835. But in *Faretta*, the Court focused its attention on the historically entrenched notion that lay people lack the skill or knowledge to deal with rules of evidence or trial practice to present a defense. *See id.* at

833 n.43 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). In a plea hearing, however, the dangers and disadvantages of self-representation are more obvious because the plea procedure is so much simpler.

Here, no one contends that the plea procedure itself goes beyond the ken of the lay person. Indeed, if the process of a plea hearing confuses a defendant (i.e., the defendant does not grasp what will happen at a guilty plea hearing), the court would have to explain how guilty pleas are entered until the defendant understands. *Cf. Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) (noting "purpose of 'knowing and voluntary' inquiry ... is to determine whether the defendant actually does understand the significance and consequences" of waiving counsel). As such, *Faretta*, the only case arguably supporting a discussion of the procedural tasks of counsel, does not support an extensive cautionary litany in the modern plea context.

C. For at least five reasons, the litany crafted crosses an important line and unnecessarily addresses the substantive role of counsel.

The litany imposed by the Iowa Supreme Court, which Tovar and the NACDL defend, addresses the substantive role counsel plays and crosses an important line.

Defense counsel can serve an important substantive role, investigating and evaluating potential defenses, judging the merits of suppression motions, advising defendant of the collateral consequences of conviction, gauging defendant's jury appeal, and assessing plea bargaining opportunities. *See* Pet. App. 15; Br. of *amicus* NACDL 6-7. For at least five reasons, the Sixth Amendment does not require a court to address counsel's substantive role for

purposes of securing a valid waiver of counsel at a guilty plea hearing.

First, in any given case a court cannot divine all substantive tasks an attorney might undertake. Indeed, the Iowa Supreme Court expected lower courts to eschew discussing specific defenses with a defendant. Pet. App. 18. Thus, at a general level the litany's only function is to take a court from its neutral role and put it in the position of encouraging representation for all *pro se* defendants pleading guilty.

Respondent's and the NACDL's position suffers from a second defect. The Sixth Amendment does not require an admonishment of the substantive value of an attorney's services in other settings – proceedings where practically speaking a defense attorney's skills may be just as or more helpful.

For example, an attorney's ability to recognize a deficient charging document or a valid defense of entrapment, coercion or defense of others, could serve a defendant well in the earliest stages of a criminal investigation. During post-indictment questioning, a skilled attorney's advice could result in a charge reduction or outright dismissal. Nevertheless, the Sixth Amendment does not require the government to advise an accused that a lawyer can better evaluate the wisdom of which questions to answer or what information it would be best to volunteer. *Compare Patterson*, 487 U.S. at 293-94 *with id.* at 307 (Stevens, J., dissenting) *with Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 165 (2000).

Third, all these substantive duties are germane to prosecutions to which the Sixth Amendment does not attach. A crime punishable only by fine is just as

susceptible to an affirmative defense or suppression issue as one punishable by incarceration. *See Scott v. Illinois*, 440 U.S. 367, 373 (1979) (holding right to counsel in state prosecution attaches where actual imprisonment results). Likewise, an OWI conviction for which no incarceration is imposed carries the same collateral consequences as a conviction resulting in jail or prison, such as license revocation or civil liability. Indeed, taken to its logical conclusion, the importance of these functions suggests no plea should be accepted but upon the advice of counsel. *See* ABA Standards for Criminal Justice, *Providing Defense Services* Std. 5-8.2(b), p. 102-06 (3rd ed. 1992). And yet, even the most demanding authorities do not *require* consultation with an attorney before entering a *pro se* guilty plea. *See* 49 Minn. Stat. Ann., R. Crim. P. 5.02(3)-(4); *see also Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

Fourth, the Iowa Supreme Court's warnings serve poorly the ends they seek. The warnings required below are underinclusive in the sense that they rest on the speculation that an able lawyer might find and advance a meritorious defense. Also, by declining to address specific defenses that a lawyer might discover and pursue, the court leaves a defendant actually unaware of potential defenses. Such an omission begs a discussion of the numerous complicated factual and legal defenses an accused might pursue.

The warnings are also overinclusive in the sense that they tell a defendant no more than what the public must surely know already: that defense attorneys see non-obvious defenses and advise people on the choice to plead guilty, plea bargain, or go to trial. Such a warning to all *pro se* defendants – particularly those facing simple

offenses with predictable punishments – risks a fruitless, costly delay to consult an attorney who will only confirm either defendant's initial impression of guilt or those matters discussed during the plea hearing.

Fifth, during a valid guilty plea colloquy, the court must discuss with the defendant how the elements are satisfied and it cannot accept a plea where an element, such as the requisite *mens rea*, is lacking. Such a plea lacks a factual basis and the defendant appears actually innocent. *See, e.g.*, Pet'r. Br. App. 1; J.A. 21-22; Fed. R. Crim. P. 11(b)(3). This factual basis safeguard, while endeavoring to protect the innocent, also highlights for the defendant the role an attorney could play should he or she choose to contest the charge and go to trial or enter a plea to a reduced charge.

Amicus NACDL raises the prospect that a defendant may be unaware that defense counsel can raise affirmative defenses. Br. for *amicus* NACDL 7. But these defenses by their nature concede the defendant committed the crime. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.8(c), p. 82 (West 2nd ed. 2003). Generally speaking, a guilty plea is valid notwithstanding an affirmative defense. The question is whether a defendant can waive counsel in ignorance of a specific consequence of doing so, particularly a consequence that does not touch on actual guilt. The answer is yes.

As this Court has observed,

> [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may

> not know the *specific detailed* consequence of invoking it. A defendant may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

United States v. Ruiz, 536 U.S. 622, 629-30 (2002) (emphasis in original).

Similarly, the Sixth Amendment does not mandate the litany devised below because a defendant may waive counsel in ignorance of an attorney's ability to evaluate the merits of a suppression motion. *See* Pet. App. 15 (noting a lawyer might know whether implied consent procedures or other statutory or constitutional restrictions might provide a basis for suppression of evidence); *see also* Iowa Code § 321J.6 (2003) (governing procedures by which peace officers may request breath, blood or urine samples). The plea procedure necessarily informs a defendant what evidence stands against him. How or whether that information would come in at trial is subsidiary to the decision to waive counsel and plead guilty.

This kind of decision is not anomalous. Defendants who plead guilty advised of the right to testify or remain silent may nevertheless be surprised to learn statements to witnesses or confederates may be admissible as exemptions from or exceptions to the hearsay rule. Or, a defendant may know of the right to confrontation, but incorrectly believe it prevents all incriminating statements from reaching the jurors' ears. Or, a defendant pleading guilty may be informed of the right to compulsory process,

but not that witness fees may be available easing the hardship of testifying.

The plea court in 1996 gave Tovar adequate information to decide whether to forgo plea counsel and admit guilt to first-offense OWI, an understandable, two-element offense with limited, predictable consequences. Pet'r Br. App. 1-2; Iowa Code § 321J.2(2). After Tovar explicitly stated he wished to represent himself, the court asked what ne wished to do. The court later gave Tovar two more opportunities to defer a guilty plea: once after explaining trial protections and once after discussing the elements of the offense. J.A. 9, 19, 27-28; *cf. Carter v. Illinois*, 329 U.S. 173, 177 (1946).[1]

Tovar knew the State's evidence supporting both elements of OWI; driving in Iowa and intoxication. He also knew that an attorney would have to deal with the same elements and evidence. *See* J.A. 23-24 (plea court discussing elements and evidence with Tovar). Tovar knew generally what an attorney could do for him. By making a fully informed waiver of his right to contest the State's charge with the assistance of counsel, Tovar knew he was relinquishing a professional evaluation of his case, an opinion on the wisdom of pleading guilty, and the chance to uncover a technical defense.

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[1] Respondent posits that the plea court was unaware of Tovar's intention to plead guilty at the beginning of the hearing. Resp. Br. 16. Even if true, that should not matter where the court repeatedly allows a defendant to defer pleading guilty without any admissions to that point being used against him. J.A. 9, 14, 19, 27-28.

The Iowa Supreme Court erred when it concluded the Sixth Amendment prevented use of this offense for enhancement purposes because the State had no proof of a knowing and intelligent waiver except this plea colloquy. Pet. App. 18. When a court engages a defendant in a full guilty plea colloquy, the Sixth Amendment does not require a separate admonition of the usefulness of counsel.

II. THE PLEA COURT SUFFICIENTLY ADVISED TOVAR – AND HE UNDERSTOOD – THAT COUNSEL WAS AVAILABLE.

The 1996 plea court sufficiently alerted Tovar to the availability of representation at the plea hearing. Tovar's claim to the contrary should not prevail. Resp. Br. 13, 16. The record does not support Tovar's view that he, like other first-time misdemeanants, may not have understood he had a right to plea counsel. *See* Resp. Br. 13, 15, 16.

The plea court observed "Mr. Tovar appears without counsel and I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?" and Tovar answered "Yes, sir." J.A. 8-9. On the face of this record, the plea court is referring to some prior occasion when Tovar was advised of his right to counsel and waived that right.[2]

[2] A record of prior stages of this case, including arrest and initial appearance, are part of the 1996 trial court papers. Petitioner has informed the Clerk by letter that these records are available for the Court's review. *See* S.Ct. Rule 32(3); Letter of Petitioner's counsel to Clerk of Dec. 18, 2003.

At the very least, this exchange substantially complies with the current rule for conducting arraignments where the court must "inform the defendant of the right to counsel and ask if the defendant desires counsel; and if the defendant does, and is unable by reason of indigency to employ any, the court must appoint defense counsel." Iowa R. Crim. P. 2.8(1); *see* Resp. Br. 12 n.1 (noting substantial, not strict, compliance with rule 2.8(2)(b) for guilty pleas is required in Iowa citing, *e.g.*, *State v. Myers*, 653-N.W.2d 574, 578 (Iowa 2002); *State v. Yarborough*, 536 N.W.2d 493, 496 (Iowa Ct. App. 1995)).

By expressly declining appointed counsel, Tovar showed he actually knew he could consult with an attorney and have one present. J.A. 8-9; *see Godinez*, 509 U.S. at 401 n.12. This awareness is consistent with Tovar's later behavior at sentencing where the same judge said,

> I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied but it was denied due to the fact that you are dependent on your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?
>
> THE DEFENDANT: No I will represent myself.

J.A. 46.

To be sure, the plea court did not say on the record "you have the right to an attorney here and if you cannot afford one, the court will appoint one." *See* Resp. Br. 13. Certainly on collateral review, so much is not required. To the extent any ambiguity exists on this point, it is Respondent who

bears – and has failed to carry – the burden of proof. *See Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938).

Not surprisingly, the reviewing courts below either held Tovar was advised of the right to counsel or did not address the issue. The majority opinion did not address it, instead holding the plea court failed to more fully state the advantages of counsel. Pet. App. 16, 18-19. Indeed, the litany crafted by the majority did not (contrary to Tovar's view) even mention informing a defendant of the right to appointed counsel. *See* Resp. Br. 15, 17; Pet. App. 18-19. On the other hand, the dissent, the Iowa Court of Appeals, and the Johnson County District court all concluded from the colloquy that Tovar was fully advised of his right to counsel. Pet. App. at 19, 30, 37.

Significantly, Tovar did not say at the 1996 plea hearing he wished he could have counsel. He unambiguously stated he wanted to represent himself. *See* J.A. 8-9. Nor did he suggest otherwise when the court noted he had waived court appointed counsel. *See id.*

Tovar stops short of asserting he actually was ignorant of his right to counsel. At best, Tovar posits that he – perhaps like other first-time offenders – "*may* have been under the mistaken impression" that he had a right to counsel at trial, but not at the plea. Resp. Br. 15, 16 (emphasis added). He does not state he labored under such a false impression. *Cf. Walker v. Johnston*, 312 U.S. 275, 280-82, 286 (1941) (holding *habeas* petitioner entitled to hearing on claim that he had desired counsel, was ignorant of his right to counsel, was not asked about his desire for counsel, was deceived into pleading guilty, and preferred to plead not guilty or at least consult with an attorney and was innocent). Neither has Tovar

affirmatively alleged that he desired counsel or would have delayed his plea to consult with an attorney. Nor has he alleged that the plea was defective because he was innocent or actually entitled to a defense.

Indeed, Tovar concedes the court fully complied with Iowa Rule of Criminal Procedure 8(2)(b) for entry of valid guilty pleas. *See* Resp. Br. 12. Accordingly, for purposes of this case we may assume the plea was knowing, voluntary, intelligent and factually based. Neither Respondent nor the Iowa Supreme Court has suggested the result of the plea hearing took Tovar by surprise.

Tovar offers little support for the bare assertion that first-time offenders "may have little understanding" of the right to plea counsel. Resp. Br. 15. Generally speaking, defendants have heard at the time of arrest and during post-indictment questioning about the right to counsel before making a statement, the right to counsel at an initial appearance, and the right to counsel at arraignment, and at trial. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (advisory of right to counsel at arrest); *Patterson*, 487 U.S. at 289-90 (same at post-indictment questioning); Fed. R. Crim. P. 11(b)(1)(D) (same regarding all stages); Iowa R. Crim. P. 2.8(1) (same at arraignment). Tovar's position would require a belief that in the face of these advisories, uninitiated entrants to the criminal justice system believe they may consult with an attorney only periodically; that the right to counsel attaches episodically and not when preparing for and entering the plea.

On collateral review, the Sixth Amendment permits a "presumption of regularity" to attach to prior judgments, even when the question is waiver of constitutional rights.

Parke v. Raley, 506 U.S. 20, 29 (1992) quoting *Johnson v. Zerbst*, 304 U.S. at 464, 468. First, nothing in this record diminishes the proposition that first-time offenders may comprehend the continuing right to counsel, even at a plea. Second, the 1996 district court's discussion with Tovar during plea and sentencing evinces Tovar's actual understanding that he could have an attorney present.

CONCLUSION

The Iowa Supreme Court erred in its conclusion that the Sixth Amendment required a plea court to recite a litany emphasizing the usefulness of an attorney, that a lawyer may provide an independent opinion on the wisdom of the plea, and that without defense counsel the defendant risks overlooking a defense. The modern guilty plea colloquy sufficiently alerts a defendant to the risks of confessing guilt without an attorney. The plea colloquy ensures that the *pro se* defendant's solemn admission in open court is knowing, voluntary, intelligent, and ultimately correct. This Court should agree and reverse.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF THE STATES OF COLORADO, ALABAMA, ALASKA, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAI'I, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Sixth Amendment prohibit enhancement of a current conviction with a prior conviction in which a *pro se* defendant waived counsel and pled guilty, but the trial court did not give a specific and detailed warning about the various ways in which an attorney might be able to assist in the defense?

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are States that oppose the imposition of undue burdens on their ability to establish that a prior waiver of counsel was knowing and intelligent. As a matter of State law, some states already impose higher standards than the Constitution requires. Other States provide the minimum protection mandated by this Court's decisions in *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948), and *Patterson* v. *Illinois*, 487 U.S. 285 (1988). Those cases hold that a defendant's waiver of counsel is knowing and intelligent as long as the defendant is *generally* informed about the right to counsel and understands in general terms the possible consequences of waiving that right. *Id.* at 292-93.

The decision below would impose an added requirement that a defendant wishing to plead guilty be given a new, *Miranda*-type warning advising him of various *specific* ways in which counsel might aid his defense. Only three states have clearly adopted regimes that would satisfy this standard. Guilty pleas from all other states would be at least presumptively invalid under the Iowa Supreme Court's approach.

Amici also oppose the ruling below because it undermines the finality of criminal judgments, with the consequence that numerous prior guilty pleas will be deemed unconstitutional and incapable of being considered in determining whether a defendant has committed crimes in the past. This would make it virtually impossible to administer and apply numerous recidivist statutes. Nationwide adoption of the decision below also would overburden State judicial processes. Trial courts would be forced to maintain transcripts of guilty plea hearings for extended periods. And sentencing judges would be required to expend scarce resources reviewing the validity of prior waivers.

SUMMARY OF ARGUMENT

I. The Iowa Supreme Court was incorrect to hold that respondent' waiver of his right to counsel was invalid under the Sixth Amendment. First, the court's decision totally ignores this Court's consistent teaching that, once a judgment is final, a waiver of counsel is presumptively valid. See, *e.g.*, *Parke* v. *Raley*, 506 U.S. 20, 29-31 (1992). Instead, the Iowa Supreme Court has now held that a waiver of counsel at the guilty plea stage is presumptively invalid, and can be rendered valid only if there was evidence in the record that the trial judge gave three specific warnings. This *per se* approach is contrary to this Court's precedents.

Second, putting aside the presumption of validity mandated by this Court's decisions, the Iowa Supreme Court imposed too high a hurdle for establishing a valid waiver, one that is inconsistent with this Court's precedents. In *Patterson* v. *Illinois*, the Court observed that its right to counsel cases have taken a pragmatic approach, asking what benefits an attorney would provide at the stage of the proceeding under review. 487 U.S. 285, 298 (1988). That case ruled that, at a postindictment interrogation, *Miranda* warnings were sufficient to make a waiver of counsel knowing and intelligent. *Id.* at 293. At the other end of the spectrum, i.e., at trial, this Court has required a searching inquiry to validate a waiver of counsel. See *Faretta* v. *California*, 422 U.S. 806, 835 (1975).

This case falls closer to a postindictment interrogation. Indeed, the skills useful at the plea stage—general advice about the elements of crimes and defenses—are useful at every phase of the process, including postindictment interrogation. Plea colloquies do not require the specialized technical skills that make a lawyer particularly useful at trial. Moreover, the guilty plea litany already provides criminal defendants with substantial information about the

consequences of their actions. This Court's precedents require nothing more.

Third, the Iowa Supreme Court's approach flouts the text and history of the Sixth Amendment. The Founders envisioned a system in which a defendant could choose between the right to self-representation and the right to counsel. In fact, the marked preference during the founding period was self-representation. Yet the Iowa Supreme Court's approach markedly prefers the right to counsel by discouraging people from self-representation.

II. Even if Mr. Tovar could demonstrate that his waiver of counsel was technically insufficient, the Iowa Supreme Court incorrectly concluded that this defect rendered his guilty plea off limits for future enhancements. The Constitution does not preclude the use of even a constitutionally invalid prior conviction for current enhancements as long as the prior conviction is a reliable indicator of the defendant's conduct. See, *e.g.*, *Custis* v. *United States*, 511 U.S. 485, 487 (1994); *Daniels* v. *United States*, 532 U.S. 374, 382 (2001). Given the other procedural protections required for a guilty plea, such a plea is generally a reliable indicator of prior conduct. And the absence of counsel does not make it inherently unreliable.

The record in this case illustrates the point. Here Respondent readily admitted his guilt in open court, and to this day has not recanted or asserted that he had a viable defense that an attorney could have asserted. Because Mr. Tovar's conviction is reliable, it may be used to enhance a future sentence. The Iowa Supreme Court's contrary ruling was based upon a misinterpretation of *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), and should be reversed.

III. The decision below also undermines the States' interest in the finality of judgments. States have an interest in punishing repeat offenders more severely than first-offenders. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 248 (1949);

Parke, 506 U.S. at27. The rule adopted below undermines the States' ability to pursue this interest because it makes vast numbers of guilty pleas unusable for future enhancements. It also imposes a substantial burden on the states to record guilty plea proceedings and to maintain those records practically indefinitely. It precludes judges from applying the presumption of regularity, thereby forcing them to undertake extensive review of prior proceedings before using convictions for current enhancements. And it creates perverse incentives for criminals to forego challenging convictions for relatively modest crimes on direct appeal or via postconviction relief, and instead to leave such challenges to future sentencing hearings.

STATEMENT OF FACTS

Amici adopt the statement of facts in petitioner's brief.

ARGUMENT

The question in this case is whether a prior uncounseled guilty plea can be used to enhance a defendant's punishment in subsequent prosecutions when the defendant now argues that he did not knowingly and intelligently waive his right to counsel before entering that plea. This case is not a direct challenge to the constitutionality of respondent's 1996 guilty plea, as he has never brought an action to vacate that conviction and, at this point, would be barred from doing so. See Pet. App. 19-20 (Carter, J. dissenting) ("Defendant's earlier OWI conviction is still on his record and will remain that way because the statute of limitations for seeking postconviction relief has now run."). Instead, respondent challenges his conviction of an enhanced offense in 2001 on the ground that the enhancement improperly relied upon his 1996 guilty plea, which he alleges is invalid because he did not knowingly and intelligently waive his right to counsel at that time.

Given the posture of this case, this Court must address two independent questions. First, did respondent validly waive his right to counsel when he entered his 1996 guilty plea? Second, even if this waiver was not valid, does that invalidity make enhancement of his later offense constitutionally impermissible? As shown below (in Sections I and II, respectively), respondent fails on both counts. Moreover, as shown in Section III, the Iowa Supreme Court's ruling would render unworkable a wide array of enhanced sentencing systems adopted by the vast majority of States.

I. THE COURT BELOW ERRED IN HOLDING THAT THE SIXTH AMENDMENT INVALIDATES RESPONDENT'S ORIGINAL PLEA.

In the decision below, the Iowa Supreme Court ruled that "a defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel." Pet. App. 18. This ruling should be reversed because it runs counter to this Court's waiver of counsel precedents and because it would make a mockery of the text and history of the Sixth Amendment.

A. The Decision Below Ignores This Court's Repeated Teaching That A Waiver Of Counsel In A Prior Conviction That Has Become Final Is Presumed Knowing And Intelligent.

At a most basic level, the decision below ignores this Court's teaching that courts should presume the constitutionality of prior convictions absent a case-specific, factual showing. To be sure, the Court has held that, before a conviction becomes final, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and [do] not presume acquiescence in the loss of fundamental rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (internal quotations omitted); see also *Boykin* v.

Alabama, 395 U.S. 238 (1969) (invalidating a guilty plea where the record provided no evidence that the plea was entered into voluntarily and understandingly).[1] Once a conviction has become final, however, the Court has adhered to the principle that "the judgment of a court carries with it a presumption of regularity." *Johnson*, 304 U.S. at 468. Thus, for example, "[w]here a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel." *Id.* at 468-69.

The Court expressly relied upon this presumption in the analogous case of *Carter* v. *Illinois*, 329 U.S. 173 (1946). There, a defendant pleaded guilty but later, after the conviction became final, challenged his plea on the ground that he had not knowingly waived his right to counsel. This Court rejected his claim because nothing in the record indicated his waiver had not been knowing and intelligent. *Id.* at 177 ("A fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel."). In *Parke*, the Court articulated the rationale underlying *Carter*, explaining that collateral attacks on prior guilty pleas are disfavored because they "ignore a[] presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments." 506 U.S. at 29, 31.

In this case, Mr. Tovar's 1996 conviction is long since final, and the record shows that he was aware of his right to counsel. Thus, the presumption of regularity acts as the

[1] *Boykin* suggests nothing more than that there must be some evidence to demonstrate that the defendant waived his right to counsel. In that case, the judge did not even inquire whether the defendant was knowingly and voluntarily waiving his right to trial, but instead appears to have accepted the guilty plea without comment or question. 395 U.S. at 239.

proper starting point for analyzing his claim of an invalid waiver of counsel. And *Carter* and *Parke* instruct that Mr. Tovar has the burden to overcome this presumption by demonstrating factually that his waiver was *not* knowing and intelligent.

The Iowa Supreme Court's decision, however, ignores this presumption and instead renders any waiver of counsel at the guilty plea stage *per se* invalid unless the judge gives the defendant three specific warnings. Pet. App. 18. Moreover, the court applied that rule here even though nothing in the record, even today, demonstrates that Mr. Tovar did not make this decision with "eyes open." *Adams*, 317 U.S. at 279.

To the contrary, at the time of the plea, Mr. Tovar was a college student, and therefore was not likely of substantially reduced intelligence. Pet. App. 4. Moreover, the trial court observed at sentencing that he (or more appropriately his parents, who continued to support him) had sufficient means to make him ineligible for appointed counsel. *Id.* at 7. He could have retained counsel at any time. When he appeared in court without counsel, the trial judge noted that he was without counsel and asked whether he wished to waive counsel. *Id.* at 4-5. Mr. Tovar stated that he wished to represent himself, and was then informed of the rights that he would be forfeiting by pleading guilty. *Id.* at 5-6. The judge also explained the minimum and maximum sentences facing Mr. Tovar—including a mandatory forty-eight hours in the local jail. *Id.* at 26. After this colloquy with the Court, Mr. Tovar still maintained his desire to plead guilty, at which point the judge explained the elements of the crime and discussed the facts that proved these elements. *Id.* at 6. To this day, Mr. Tovar has presented no evidence of coercion, confusion, or mistake.[2]

[2] Indeed, Mr. Tovar has not even alleged that had he been so warned, he would have attempted to hire counsel. *See generally* Appellant's Brief and Argument, *Iowa* v. *Tovar*, No. 01-1558 (Iowa filed Mar. 07, 2002).

Accordingly, the presumption of regularity recognized in such decisions as *Carter* and *Parke* should have been dispositive here. The Iowa Supreme Court's failure to acknowledge and apply that presumption is sufficient grounds for reversal.

B. Under this Court's Precedents, A Defendant Can Validly Waive His Right To Counsel Without Knowing The Exact Reasons Why An Attorney Might Be Useful To His Defense.

Aside from ignoring this Court's presumption of regularity for final convictions, the Iowa Supreme Court's ruling requires substantially more than this Court has required in any case other than those dealing with the right to counsel *at trial*.

Since this Court first began considering waivers of the Sixth Amendment right to counsel, the rule has been that a criminal defendant "may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." *Adams*, 317 U.S. at 279. Deciding whether there has been a knowing and intelligent waiver is a fact-intensive, case-specific task. See, *e.g.*, *Johnson*, 304 U.S. at 464; *Adams*, 317 U.S. at 278.

Accordingly, this Court has not articulated a formulaic rule that applies in every situation. Instead, as the Court noted in *Patterson* v. *Illinois*, 487 U.S. 285 (1988), the Court has:

> taken a more pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the proceeding in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

Thus, he has failed to establish any prejudice from the failure to provide the warnings mandated by the court below.

Id. at 298.

In *Patterson*, the Court faced the question of what information a criminal defendant needed to waive his right to counsel during a post-indictment interrogation. The Court simply asked: "Was the accused . . . made sufficiently aware of his right to . . . counsel . . . and of the possible consequences of a decision to forgo the aid of counsel?" *Id.* at 292-93. Ultimately, the Court ruled that, if the defendant waived his right to counsel after receiving *Miranda* warnings, the waiver was necessarily knowing and intelligent. *Id.* at 293. The Court noted that these warnings fully informed the defendant of his rights and conveyed the consequences of not invoking those rights (i.e., that anything he said could be used against him at trial). *Id.* at 293-94. The Court observed that the role of an attorney at a postindictment interrogation is limited—it is merely to advise the defendant "what questions to answer and which ones to decline to answer." *Id.* at 294 n.6. And the Court expressly distinguished postindictment questioning from trial, noting that "[a]t trial, an accused needs an attorney to perform several varied functions—some of which are entirely beyond even the most intelligent layman." *Id.*.

At the opposite end of the spectrum, the Court addressed the requirements for waiver at trial in *Faretta* v. *California*. There, the Court noted that "[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." 422 U.S. at 835. Accordingly, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* (quoting *Adams*, 317 U.S. at 279).

Even in that context, moreover, the Court did not require any specific questions or admonishments to make a criminal defendant aware of these "dangers and disadvantages." Instead, the Court concluded that the trial judge had fulfilled

his responsibility by warning Mr. Faretta that he thought it a mistake not to accept counsel and by explaining that he would be required to follow the "ground rules" of trial procedure. *Id.* at 835-36. Thus, for a valid waiver of the right to counsel *at trial,* the court need do no more than provide general advice against waiver and admonishment that the defendant will be required to follow accepted procedure.

This case falls between these two extremes, involving, as it does, the decision of a criminal defendant to plead guilty. Accordingly, such a proceeding cannot possibly require *more* than this Court held in *Faretta* was necessary for a valid waiver of counsel at trial.

In all events, the Iowa Supreme Court incorrectly assumed that an attorney would be particularly useful at the guilty plea stage because an attorney would understand the elements of the alleged crime and its defenses, which would allow for a better assessment of whether the defendant should plead guilty. See Pet. App. 18. In fact, however, this general background knowledge of criminal law would be useful to a criminal defendant at *every* stage of the proceeding, from investigation through trial. Indeed, in the post-indictment interrogation at issue in *Patterson*, knowledge of the elements of crimes and their defenses would, no doubt, animate the directions an attorney would give a client. Standing alone, therefore, those skills cannot distinguish a post-indictment interrogation from a plea hearing.

Indeed, in some ways, a criminal defendant needs an attorney *less* at a guilty plea hearing than during a post-indictment interrogation. A plea hearing is a formal judicial proceeding, and few, if any, defendants will misjudge the gravity of the affair. Additionally, before pleading guilty, a defendant is provided with a wealth of information. The judge must explain exactly what rights a defendant is giving up by pleading guilty, including his Fifth and Sixth Amendment procedural rights. See *Boykin*, 395 U.S. at 243. Judges must also explain the punishment range and the

elements of the crime. See *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976); see also Iowa R. Crim. P. 2.8; Fed. R. Crim. P. 11. After providing this information, the judge must then be satisfied that there are sufficient facts to demonstrate that the defendant committed the crime and that no unlawful coercion has led to the plea. If any defendant begins a guilty plea hearing failing to grasp the gravity of the situation, this colloquy with the judge will surely underscore the seriousness of the proceeding.

By contrast, although a defendant in a post-indictment interrogation must be informed of his *Miranda* rights, he need not be informed of the elements of the crime with which he is charged. See *Patterson*, 487 U.S. at 294-95 (explaining that defendant was told of the charge but not indicating that he was informed of the elements of the crime). Nor do *Miranda* warnings necessarily make a defendant aware that what he says might undermine a possible defense. Moreover, such interrogations are markedly more informal than plea hearings, which might make defendants underestimate their gravity.

In the end, then, the skills that an attorney could use to help a defendant at the guilty plea stage are practically the same as those that make an attorney useful during a police interrogation.

By contrast, an attorney must bring a whole different set of skills to be effective at trial. She must be well versed in procedure and evidence. *Id.* at 299 n.13 ("But at trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more."). And she must be persuasive. These specialized legal skills, which few if any laymen are likely to possess, make an attorney very useful, perhaps indispensable, at trial. But these specialized skills are far less useful at the plea stage, as the procedure is simple and there is no one to persuade.

Thus, under the *Patterson* analysis, it is sensible to treat trials differently because the skills needed to navigate a trial are likely possessed only by attorneys. Because an attorney is so crucial at trial, this Court has reasonably required a judge to engage in a searching inquiry to ensure that a defendant's waiver of counsel at trial is knowing and intelligent. But that rationale does not apply to plea proceedings any more than police interrogations.

The Sixth Amendment, therefore, cannot be said to require more than an assurance that the defendant was generally informed of his right to counsel and the consequences of waiving that right. Mr. Tovar was so informed.

C. The Iowa Supreme Court's Opinion Flouts The Text And History Of The Sixth Amendment.

The decision below also flouts both the text of the Sixth Amendment and the history of the right to counsel. That history demonstrates that, if anything, the Sixth Amendment favored a system of self-representation but provided defendants with an option to be represented by counsel. It was not designed to impose any procedural requirements for waiver of the right to counsel.

To be sure, this Court departed from this understanding of the Sixth Amendment some seventy years ago in *Johnson* v. *Zerbst*, where this Court first began to require a heightened showing of the intent to voluntarily waive the right to counsel. 304 U.S. at 464. Nevertheless, in deciding whether to impose an additional procedural requirement, it is important to bear in mind the pertinent textual and historical evidence.

1. The Sixth Amendment says only that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend VI. The language of the Amendment does not require that the government take any action to ensure that a defendant is even aware of his right to representation by counsel—only that the government not

interfere with that right. Indeed, the text of the Sixth Amendment "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta*, 422 U.S. at 819.

The most telling aspect of the Amendment's text is that it speaks of the *assistance* of counsel. As this Court has previously recognized, "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* at 820. The language of the Amendment, then, sets up a system in which the accused has responsibility for choosing among the many tools available for his defense, including the right to counsel. The Amendment's text, therefore, provides no basis for requiring a judge to admonish the defendant that refusing counsel is a poor choice, or of the reasons it might be a poor choice.

2. Nor do the Sixth Amendment's historical roots justify the rule adopted by the Iowa Supreme Court. Throughout the colonial and revolutionary periods, the right to counsel was not fully recognized by English law. To the contrary, "the law of England permitted a prisoner to be heard by counsel in misdemeanor and treason cases only. In ordinary felony cases the participation of counsel was prohibited." Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 109 (1951) ("Heller, *Sixth Amendment*"); see also *Powell* v. *Alabama*, 287 U.S. 45, 60 (1932). Thus, the Framers' intent in adopting the Sixth Amendment's right to counsel, "was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right to be represented by counsel, presumably of his own choice and at his own expense." B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled To Court Appointed Counsel?*, 5 Roger Williams U.

L. Rev. 417, 425-26 (2000); *accord United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891); Heller, *Sixth Amendment* 109.

But nothing in the history of the Sixth Amendment suggests an intention to impose procedural obstacles to the waiver of counsel. To the contrary, the development of the right to counsel in Colonial America reflects a general distrust of lawyers. As this Court recognized in *Faretta*:

> The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, 'the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions.'

422 U.S. at 826 (quoting C. Warren, *A History of the American Bar* 7 (1911)).

This conclusion is supported by early guarantees of liberty in the American Colonies. The first recognition of a right to counsel in America came in 1641, when the Massachusetts Body of Liberties proclaimed:

> Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines.

Massachusetts Body of Liberties, *Rites Rules and Liberties concerning Juditiall proceedings* ¶ 26 (1641), *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 71-84 (1971). This was a revolutionary development, that is, "to recognize that individual liberty depended, in the last resort, upon the courts, and to provide in detail for the rights of litigants and accused in judicial proceedings was as

perceptive as it was unprecedented at that time." Bernard Schwartz, *The Great Rights of Mankind* 37 (1977). Noticeably, however, the Bill of Liberties would not allow counsel to be paid, consistent with the general notion at the time that "'it shall be a base and vile thing to plead for money and reward.'" Heller, *Sixth Amendment* 19 (quoting Carolinas' Fundamental Constitutions, Art. 70); see also The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New Jersey ch. XXII (1677), *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 129 (1971) ("no person or persons shall be compelled to fee any attorney or counciller to plead his cause, but that all persons have free liberty to plead his own cause, if he please.").

Between these early statements and the adoption of the Sixth Amendment in the late Eighteenth Century, the general practice of allowing counsel to plead cases for defendants slowly gained acceptance. As a result, by the time the Bill of Rights was adopted, twelve of the thirteen colonies had renounced the English common-law rule. Heller, *Sixth Amendment* at 109. At the same time, however, "even where counsel was permitted, the general practice continued to be self-representation." *Faretta*, 422 U.S. at 828 (citing H. Rankin, *Criminal Trial Proceedings in the General Court of Colonial Virginia* 89-90 (1965)).

After reviewing this history, this Court has previously concluded that "there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel." *Id.* at 832. In the end, then, the drafters of the Sixth Amendment were intent on protecting a system in which the accused could choose between self-representation and counsel. There is no reason to believe they meant to prefer counsel or to impede a defendant's choice of self-representation.

In short, the Iowa Supreme Court's ruling should be overturned because it runs afoul of this Court's precedents and because it cannot be justified by reference to the Sixth Amendment's text or history.

II. THE DECISION BELOW ERRED IN HOLDING THAT AN INVALID WAIVER NECESSARILY MAKES A GUILTY PLEA UNUSABLE FOR FUTURE ENHANCEMENTS.

Even if Respondent could establish that his Sixth Amendment rights were violated at the time of his conviction, that would not be the end of the inquiry. For he must also establish that such an invalid conviction cannot be used to enhance a prior conviction. The Iowa Supreme Court interpreted this Court's decisions in *Baldasar* v. *Illinois*, 446 U.S. 222, 226 (1980), and *Nichols* v. *United States*, 511 U.S. 738, 748-49 (1994), to mean that if Mr. Tovar did not validly waive counsel in his 1996 guilty plea, that conviction could not constitutionally be used to enhance his current sentence. See Pet. App. 3 (Iowa Supreme Court ruling) (citing *Baldasar*, *Nichols*, and *State* v. *Cooper*, 343 N.W.2d 485, 486 (Iowa 1984), a state case that relied heavily upon *Baldasar*). Because the Iowa Supreme Court's decision on this question was based in federal constitutional law, this Court has the authority to evaluate whether the Iowa Supreme Court correctly interpreted federal law in reaching its conclusion.[3]

It did not. Under this Court's precedents a sentencing judge may consider *all* reliable evidence in deciding what punishment to impose on a defendant. Accordingly, a sentencing judge may use even an invalid conviction as long

[3] This conclusion is not undermined by the fact that an Iowa statute requires that prior convictions used to enhance a later offense be proved beyond a reasonable doubt. *See State* v. *Talbert*, 622 N.W.2d 297, 301 (Iowa 2001). The existence of Mr. Tovar's conviction was proved beyond a reasonable doubt; he does not challenge that. He merely claims that, as a matter of constitutional law, this conviction may not be used for enhancement purposes. *See* Pet. App. 3-4.

as the defendant was not wholly denied the right to counsel *at trial*, thereby rendering his conviction inherently unreliable.

A. The Iowa Supreme Court Misinterpreted This Court's Precedents, Which Allow Prior Convictions To Be Used To Enhance Sentences As Long As They Are Reliable.

Contrary to the Iowa Supreme Court's conclusion, this Court's precedents hold that the Constitution precludes the use of a prior conviction for enhancement only if that conviction is an unreliable indicator of prior conduct. Respondent cannot demonstrate that his prior guilty plea is unreliable for that purpose.

1. In *Williams* v. *New York*, 337 U.S. 241 (1949), this Court clearly pronounced that at sentencing a trial judge may consider a wide array of information that may not appropriately be considered in deciding a defendant's guilt:

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

Id. at 247. The Court also noted that current sentencing philosophy requires judges to consider more than the crime because "the punishment should fit the offender and not merely the crime." *Id.* The trial judge must, therefore, be allowed to consider a wide range of facts to best tailor the punishment to the case subject only to the requirement that it not allow materially untrue facts to affect the sentence. See *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948) ("this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result,

whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.").

Although decided over fifty years ago, *Williams* and *Townsend* remain the touchstones for analysis of the constitutionality of criminal sentences in non-capital cases. See 5 LaFave et al., *Criminal Procedure* § 26.4(a) (2d ed. 1999); see also *United States* v. *Grayson*, 438 U.S. 41, 45-50 (1978) (reaffirming *Williams'* central premise that judges may consider all relevant, reliable information at sentencing); *United States* v. *Watts*, 519 U.S. 148, 151-52 (1997) (same); *Apprendi* v. *New Jersey*, 530 U.S. 466, 481 (2000) (indicating that *Williams* is still good law for non-capital cases in which the judge sentences a defendant within the statutory range). Thus, according to this line of cases, the Iowa sentencing court was, under the Constitution, allowed to consider all reliable, relevant information.

2. Commensurate with the principle that the sentencing judge is entitled to consider virtually any information about a criminal defendant, this Court has generally been very suspicious of attempts to attack prior convictions at current sentencing proceedings. Indeed, the Court has repeatedly held that, as a general rule, the Constitution does not require that defendants be allowed to make such collateral attacks. See, *e.g.*, *Custis* v. *United States*, 511 U.S. 485, 487 (1994); *Daniels* v. *United States*, 532 U.S. 374, 382 (2001); cf. *Parke*, 506 U.S. at 29-30 (given the "presumption of regularity" that attaches to final judgments, a state is free to place the burden of showing the invalidity of a prior conviction on the defendant). This rule is based on the "interest in promoting the finality of judgments." *Custis*, 511 U.S. at 497. Indeed, "[t]hese principles bear extra weight in cases in which the prior convictions . . . are based on guilty pleas, because when a guilty plea is at issue, 'the concern with finality served by the limitation on collateral attack has special force.'" *Id.* (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979)).

This result is not surprising given the Court's holding in *Williams* that all information about the defendant is relevant to the sentencing decision. Even if a prior conviction is constitutionally infirm, it is relevant because it conveys some information about the defendant's past conduct.

Of course, this Court has recognized an exception to this general rule when the constitutional violation alleged is based on a denial of the right to counsel at trial, as in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). That exception has been acknowledged in decisions such as *Burgett* v. *Texas*, 389 U.S. 109 (1967) (prior conviction after trial could not be used in defendant's current prosecution where the defendant was not afforded counsel); *United States* v. *Tucker*, 404 U.S. 443, 444-45 (1972) (defendant was entitled to re-sentencing after two of his prior convictions were vacated on the grounds that he had not been advised of, and did not validly waive, his right to legal assistance); *Loper* v. *Beto*, 405 U.S. 473 (1972) (plurality) (prior uncounseled convictions could not be used to impeach a defendant).

The reason for the *Burgett/Tucker* exception is, no doubt, this Court's belief that a conviction achieved in violation of *Gideon* is not a reliable indicator of past conduct. Indeed, in *Loper*, this Court explained that: "'[t]he absence of counsel impairs the reliability of such convictions. . . .'" *Id.* at 483 (quoting *Gilday* v. *Scafati*, 428 F.2d 1027, 1029 (1970)).

By contrast, in *Lewis* v. *United States*, this Court held that a prior conviction based on a guilty plea without a valid waiver of counsel *could* serve as the prerequisite felony for the federal felon-in-possession statute, 18 U.S.C. § 1202(a)(1). *Lewis*, 445 U.S. 55, 67 (1980). The Court noted that the situation there was different from *Burgett*, *Tucker*, and *Loper* because "[i]n each of these cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction." *Id.*; see also *Strickland* v. *Washington*, 466 U.S. 668, 691-92 (1984) ("The purpose of

the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to *justify reliance on the outcome of the proceeding.*") (emphasis added); *Custis*, 511 U.S. at 496 ("failure to appoint counsel for an indigent defendant was a unique constitutional defect;" and ineffective assistance of counsel does not "rise[] to [that] level").

In sum, the teaching of this Court's rulings is that prior convictions may be used to enhance a defendant's sentence so long they are reliable indicators of the defendant's prior conduct.[4]

B. Uncounseled Guilty Pleas Are Not Inherently Unreliable.

As noted above, *Burgett* and *Tucker* dealt with allegations of the deprivation of the right to counsel *at trial*. This Court has long realized that even the most intelligent layman stands little chance of succeeding at trial. See *Powell*, 287 U.S. at 69; *Patterson*, 487 U.S. at 299 n.13. Indeed, even an innocent defendant often will not be able to present a sufficient defense at trial in light of the technical rules of procedure and evidence. Thus, when faced with a trial conviction of an uncounseled defendant, a court cannot adequately convince itself that the conviction was the result of the defendant's guilt and not his incompetence at trial. Such wholly uncounseled trial convictions are, therefore, inherently

[4] Neither *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam) nor *Nichols* v. *United States*, 511 U.S. 738 (1994), undermines this principle. Those cases dealt with a wholly different question stemming from this Court's "actual imprisonment" standard for the right to counsel in misdemeanor cases. The question was whether the use of uncounseled convictions — which were valid at the time of conviction because the defendant was not sentenced to imprisonment — became invalid if used to enhance future sentences. *Baldasar* held that such use of these uncounseled convictions rendered them invalid. 446 U.S. at 224. This Court later rejected this conclusion in *Nichols*. 511 U.S. at 748. Noticeably, in *Nichols*, this Court cited *Burgett*, *Tucker*, and *Williams*. *Id.* at 743 n.9, 747. Thus, nothing in *Baldasar* or *Nichols* alters the rule that even an invalid conviction can be a reliable indicator of past conduct.

unreliable indicators of guilt. Because they are unreliable, this Court has indicated that the Constitution requires that they not be considered in subsequent sentencing proceeding. See *Townsend*, 334 U.S. at 741.

By contrast, in a case such as this one in which a defendant waived his right to counsel at a guilty plea hearing after being duly informed of this right, the situation is different. First, a judge generally will not accept a guilty plea unless the defendant is willing to admit his guilt after being fully apprised of his right to plead not guilty and all of the concomitant rights that would come with a trial. See, *e.g.*, *Boykin*, 395 U.S. at 243; *Henderson*, 426 U.S. at 647. Moreover, a judge will not accept a guilty plea unless satisfied that there is sufficient factual evidence to support a finding of guilt.[5] Thus, when a judge accepts a guilty plea (whether counseled or uncounseled), there is little reason to doubt that the defendant did, in fact, commit the crime. The very acceptance of the plea, then, demonstrates some level of reliability.

Mr. Tovar's case provides an apt example. After he was informed of his rights and the possible punishment he faced, he admitted in open court that he was, in fact, driving and did not contest that his blood alcohol level was well above the legal limit. Pet. App. 6. He therefore admitted that he committed a crime, and the judge found sufficient evidence to support this conclusion. There is little concern that his conviction is not a reliable indication that he committed a crime, whether or not he might have escaped conviction if he had retained a lawyer.

If the language of *Burgett*, *Tucker*, and *Loper* left any doubt that a guilty plea following a waiver of counsel could be used to enhance a future sentence, that doubt was removed by

[5] In the case of so called "Alford pleas", the defendant need not admit his guilt because he is entering a guilty plea to avoid a potentially higher sentence. *See generally North Carolina* v. *Alford*, 400 U.S. 25 (1970). Such pleas are irrelevant to this case because Mr. Tovar admitted his guilt.

Custis. There, the Court held that a defendant could not collaterally attack his conviction on ineffective assistance of counsel grounds. 511 U.S. at 496; *accord Lackawanna County Dist. Attorney* v. *Coss*, 532 U.S. 394 (2001). A claim of ineffective assistance of counsel surely calls the reliability of the underlying conviction into doubt to some extent, but this was not deemed enough to render such a conviction off limits for future sentencing.

The alleged violation in this case does nothing to call Mr. Tovar's guilt into doubt. Accordingly, the Constitution does not exclude Mr. Tovar's prior guilty plea from his 2001 prosecution, even if his waiver of counsel was a technical violation of the Sixth Amendment. The Iowa Supreme Court's contrary ruling should be reversed.

III. THE DECISION BELOW UNDERMINES THE STATES' INTEREST IN THE FINALITY OF JUDGMENTS AND WOULD INTERFERE WITH THE OPERATION OF ENHANCED SENTENCING SYSTEMS NATIONWIDE.

As a policy matter, the decision below would also undermine the States' powerful interest in the finality of criminal judgments. This Court has recognized that interest in numerous contexts. For example, in *Lackawanna County*, this Court explained that "[o]nce a judgment of conviction is entered in state court," and once direct appeal and state and federal postconviction remedies have been exhausted or waived, "the defendant's conviction becomes final and the State that secured the conviction obtains a strong interest in preserving the integrity of the judgment." 532 U.S. at 402-03. The Court then noted that "[o]ther jurisdictions acquire an interest as well, as they may then use that conviction for their own recidivist sentencing purposes, relying on the 'presumption of regularity' that attaches to final judgments." *Id.* at 403 (citations omitted). Accordingly, the Court went on to hold that "once a state conviction is no longer open to direct or collateral attack in its own right because the

defendant failed to pursue those remedies while they were available . . . the conviction may be regarded as conclusively valid." *Id.*

The Iowa Supreme Court ignored this important interest in finality. As a result, its decision, if affirmed, would have untoward effects on the administration of justice throughout the Nation. Indeed, it would make the administration of recidivist statutes very difficult.

1. This Court has long recognized that states have a valid interest in punishing repeat criminals more severely. See, *e.g.*, *Williams*, 337 U.S. at 248; *Parke*, 506 U.S. at 27. Indeed, such graduated sentencing regimes "have a long tradition in this country that dates back to colonial times." *Parke*, 506 U.S. at 26. States and the federal government have adopted various forms of sentencing regimes that punish recidivists more harshly, including statutes that specifically ratchet up the applicable punishment range for each subsequent offense, see, *e.g.*, Iowa Code §§ 123.46, 123.91 (increased punishment for subsequent public intoxication offense); Colo. Rev. Stat. § 18-6-801(7) (enhanced penalty for repeated domestic violence convictions); *id.* §§ 18-18-405, -406, -407 (enhanced penalties for repeated drug offenses); 21 U.S.C. §§ 842, 843, 844a, 849, 851 (enhanced punishment for subsequent drug offenses).

More generally, the vast majority of American sentencing law calls on the judge to consider the defendant's criminal history. Under the Federal Sentencing Guidelines, for example, one of the key factors contributing to the sentence imposed is the defendant's criminal history score. See, *e.g.*, Federal Sentencing Law & Practice ch. 4, pt. A, cmt. (2003); see also Colo. Rev. Stat. § 18-1.3-401(6).

If this Court were to affirm the ruling below, it would create a new rule that permits a criminal defendant to challenge the use of a prior conviction—long since final and no longer subject to direct or collateral attack—to enhance his

current sentence. Even assuming this rule would apply only to future prosecutions, it would have widespread effects on the criminal justice system. In future prosecutions where the prosecution cannot show compliance with the new rule, the guilty plea could not be used to enhance the current sentence.

Adopting the Iowa Supreme Court's rule would thus frustrate the States' legitimate attempts to punish recidivists more severely than first-time offenders. Indeed, a large number of states have expressly adopted rules that require less searching inquiry than that required by the court below. *See* Resp'ts Br. In Opp'n To Cert. at 10 (stating that Louisiana, Michigan, South Dakota, and Texas do not require *Faretta*-style inquiries for guilty pleas); *id.* at 11 (describing the regimes in Nevada, California, Illinois, North Carolina, and Vermont as adopting a variance of the *Von Moltke* rule, but not asserting that these jurisdictions require the judge to give the admonishments now required by the Iowa Supreme Court). Under the Iowa Supreme Court's ruling, any uncounseled guilty plea from any of these states would be presumptively invalid and could not be used to enhance any future sentence.

In this regard, Mr. Tovar is wrong in contending that States that require *Faretta*-style advisements in *pro se* guilty pleas have necessarily met the standard set by the Iowa Supreme Court. *Id.* at 13. For example, Florida appears to have adopted *Faretta*, but nothing in its rule governing the waiver of counsel or in court opinions interpreting it require the trial judge to give the specific admonishments that the Iowa Supreme Court opinion now would require. See Fla. R. Crim. P. 3.111(d)(2)(before accepting a waiver of counsel, "the court shall advise the defendant of the disadvantages and dangers of self-representation"); *Clary* v. *State*, 818 So. 2d 686 (Fla. Dist. Ct. App. 2002) (reversing for the failure to conduct a *Faretta*-style inquiry but not requiring any specific admonishments). Uncounseled guilty pleas from Florida, therefore, may very well not meet the requirements of the

Iowa Supreme Court, rendering them off limits for future sentencing enhancement. The same will be true with most every State because even those States that require a more searching inquiry do not require the specific warnings that the Iowa Supreme Court has now held *must* be given.[6]

Indeed, a close examination of state-law precedent from around the country demonstrates that guilty pleas from only three states—Minnesota, Oregon, and Pennsylvania—would satisfy the Iowa Supreme Court's ruling. See App. of State Authorities. No other state appears to require that a trial judge give these specific warnings, and almost every state recognizes that deciding whether a defendant knowingly and intelligently waived his right to counsel requires a fact-specific inquiry—an inquiry that takes precedence over any formulaic instructions from the trial judge.[7] *Id.* Thus, the Iowa Supreme Court's rule would invalidate virtually every uncounseled guilty plea nationwide.

Rendering the vast majority of guilty pleas unusable for future sentencing enhancement would clearly have a large impact on the administration of justice. A large number of criminal defendants plead guilty and many do so without the aid of counsel. See *United States* v. *Ruiz*, 536 U.S. 622, 632 (2002) (90 percent or more of the federal criminal cases are

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[6] The same is likely true of the states that "prefer their courts to go into detail regarding the usefulness of an attorney." Resp't's Br. In Opp'n To Cert. at 12. Alaska, for example, encourages its courts to give these instructions, *see Swenson* v. *Municipality of Anchorage*, 616 P.2d 874, 878 n.4 (Alaska 1980), but it has upheld convictions obtained at trial where these instructions were not given. *See Williams* v. *State*, 616 P.2d 881, 882-82 (Alaska 1980). Guilty pleas in Alaska, then, will not necessarily satisfy the Iowa Supreme Court's new rule.

[7] Colorado and certain other states have adopted stringent waiver requirements, but none of these states has adopted the Iowa Supreme Court's required trilogy. *See generally* App. of State Authorities. Moreover, almost every state holds that a waiver made in violation of their standards can still be knowing and intelligent based upon the totality of the circumstances. *See* App. (discussion of Colorado, District of Columbia, New Jersey, Oregon).

plea bargained); see also Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* 1, 7, tbl.14 (Bureau of Justice Statistics, November 2000) (stating that nearly thirty percent of inmates accused of public order offenses in the nation's 75 largest counties report that they represented themselves). The Iowa Supreme Court's ruling would thus preclude the operation of enhanced sentencing systems in a large number of cases.

2. If affirmed, the decision below would also place a great strain on judicial resources. First, it would require courts to create voluminous records. Under the rule adopted below, a prior uncounseled guilty plea can be used for sentencing enhancement only if the state demonstrates that the trial judge gave at least three specific instructions over and above the litany required before a guilty plea. However, as this Court observed in *Nichols*, "a large number of misdemeanor convictions take place in police or justice courts which are not of record;" thus, memorializing warnings prior to entry of a guilty plea by a pro se defendant would require a "drastic change in the procedures of these courts." 511 U.S. at 748. Even in courts of record, states do not routinely create transcripts. In Colorado, for example, transcripts are usually generated only when the defendant requests them on direct appeal.

Further, the decision below would require courts to maintain records of plea colloquies indefinitely, thereby requiring states to maintain archives of ancient transcripts that are now not routinely kept for an extended period of time. See, *e.g.*, *United States* v. *Hartsock*, 347 F.3d 1 (1st Cir. 2003) (states routinely destroy supporting records). Therefore, requiring the government to shoulder the burden of persuasion would place "'an impossible burden on the prosecution to establish the existence of facts within the special knowledge of the defendant.'" *Id.* at 7 (quoting LaFave, *Substantive Criminal Law*, § 1.8 (1986)). Moreover, states would need to create methods for sharing these

transcripts from state to state, so that a criminal's out-of-state convictions could be considered as part of his sentencing. See *Parke*, 506 U.S. at 28 (noting that studies suggest that up to two-thirds of those arrested have criminal records, often from other jurisdictions).

In addition to the logistical problems with maintaining the hearing transcripts, the Iowa Supreme Court's approach would drain judicial resources by requiring courts to conduct in-depth analysis of prior guilty pleas before they can be used for sentence enhancement. Indeed, a judge would be required to procure the transcript from whatever jurisdiction has it, and then review it to ensure that the judge in the prior proceeding gave the appropriate admonishments. This exercise would, no doubt, occupy a good deal of judicial resources. See, *e.g.*, 2 David Rossman, *Criminal Law Advocacy: Guilty Pleas* ¶ 6.06, at 6-51 (2003) (collateral attacks can require "examining incomplete records from far away jurisdictions in cases long ago closed and forgotten. The practical problems of finding the facts to support or refute a claim about the validity of a plea in such conditions are immense."); *accord Lackawanna County*, 532 U.S. at 403.

3. Holding that a defendant may collaterally challenge a prior guilty plea on the ground that it was not made knowingly and intelligently would also undermine incentives for defendants to raise these issues in the proper forum—direct appeal and state and federal postconviction relief proceedings. As this Court has recognized, our system provides a defendant many opportunities to challenge the constitutionality of his conviction—direct appeal, post-conviction proceedings under state law, and federal habeas proceedings. *Daniels*, 532 U.S. at 381. Forcing defendants to raise claimed constitutional violations in these proceedings is advantageous because it allows the defendants to vindicate their constitutional rights while still allowing the State to preserve its interest in punishing the guilty and imposing harsher penalties on repeat offenders.

This case presents an apt example. Had Mr. Tovar attacked the validity of his waiver of counsel on either direct appeal or postconviction relief, the remedy, if he succeeded, would have been an order vacating his guilty plea. See Iowa Code § 822.7. This would have vindicated his constitutional right. But it would also have returned the parties to their pre-guilty-plea position, allowing them to proceed again without the constitutional error. Iowa would have been free to proceed to trial on the charges. Thus, the State would have been able to vindicate its interest in punishing those who commit crimes.[8]

Were Respondent to succeed in this case, however, his prior guilty plea could not be considered in his present or future sentencing. But the State of Iowa would never be able to remove the taint of such a ruling because, until Mr. Tovar's previous conviction is vacated, a new prosecution is not allowed. See U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). Thus, regardless of the strength of the State's evidence against Mr. Tovar, the State would never be able to remedy the constitutional problem and vindicate the State's interest in punishing the guilty (or in this case subjecting recidivists to increased punishment). A reversal of the decision below will force defendants to raise their claims either on direct appeal or via a postconviction relief proceeding, and thereby give prosecutors a fair opportunity to vindicate the public's interest in ensuring that the guilty are punished and that recidivists are punished more severely.

In sum, the decision below would seriously undermine the States' important interest in the finality of criminal convictions. Such a rule should therefore be implemented, if at all, as a matter of state law, and not as a matter of federal constitutiona! law.

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[8] Indeed, given that the uncontroverted evidence demonstrated that Mr. Tovar was driving while his blood alcohol content was .194 percent, Iowa would, no doubt, have initiated new proceedings had Mr. Tovar successfully had his guilty plea vacated.

CONCLUSION

For these reasons, the decision of the Supreme Court of Iowa should be reversed.

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APPENDIX

APPENDIX OF STATE AUTHORITIES

Alabama: Ala. R. Crim. P. 6.1 ("A defendant may waive his or her right to counsel in writing or on the record, after the court has ascertained that the defendant knowingly, intelligently, and voluntarily desires to forgo that right."); *Ex Parte Reese*, 620 So. 2d 579, 581 (Ala. 1993) (finding requirements of Rule 6.1 were not met where there was no evidence that trial judge engaged in a colloquy to ensure that the waiver was knowing, intelligent, and voluntary but not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Alaska: Alaska R. Crim. P. 39(a) ("The court shall advise a defendant who appears without counsel for arraignment, change of plea, or trial of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel."); *Id.* 39(b)(4) ("In the absence of a request by a defendant otherwise entitled to appointment of counsel, the court shall appoint counsel unless the court finds that the defendant understands the benefits of counsel and knowingly waives the right to counsel."); *Williams* v. *State*, 616 P.2d 881, 882-83 (Alaska 1980) (affirming conviction of uncounseled defendant at non-jury trial where trial judge did not give the admonishments now required by the Iowa Court).

Arizona: Ariz. R. Crim. P. 6.1(c) ("A defendant may waive his or her rights to counsel under (a) and (b), in writing, after the court has ascertained that he or she knowingly, intelligently and voluntarily desires to forego them."); *State* v. *Natoli*, 158 Ariz. 525, 527, 764 P.2d 10, 12 (1988) (upholding use of prior uncounseled conviction for enhancement purposes even when there was no evidence of specific admonishments).

Arkansas: *King* v. *State*, 304 Ark. 592, 595, 804 S.W.2d 360, 361-62 (Ark. 1991) (noting that on direct appeal, "[t]he minimum for determining whether a waiver was knowing and intelligent is a record which shows that the accused was made aware of the dangers and disadvantages of self-representation, and that he understood the consequences of his choice," and not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

California: Cal. Penal Code § 1018 ("No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel."); *People* v. *Paradise*, 108 Cal. App. 3d. 364, 366, 166 Cal. Rptr. 484, 485 (1980) ("The issue is whether before accepting a guilty plea to a misdemeanor a trial court must expressly advise a defendant who appears without counsel of the dangers and risks of self-representation. We hold that such advisement need not appear of record so long as the record as a whole shows that the express waiver of counsel was intelligent and with understanding.").

Colorado: *People* v. *Arguello*, 772 P.2d 87, 95-96 (Colo. 1989) (holding that a judge should go through a detailed colloquy with a defendant including advising of the dangers of self-representation, but stating "A court's failure to comply substantially with this requirement does not automatically render the waiver invalid, but is an exception which should rarely be invoked."); but see *Martinez v. People*, 166 Colo. 132, 134-35, 442 P.2d 422, 423 (1968) (upholding waiver even though defendant was informed only that he had a right to counsel); *People* v. *Smith*, 881 P.2d 385, 389 (Colo. App. 1994) (minor omissions from inquiry discussed in Arguello did not render wavier invalid).

Connecticut: *State* v. *Day*, 233 Conn. 813, 822, 661 A.2d 539, 547 (1995) (stating that a trial judge may not accept a waiver of counsel for trial proceedings unless the defendant "'[h]as been made aware of the dangers and disadvantages of self- representation,'" but not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Delaware: Del. Super. Ct. Crim. R. 44 ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned . . . unless, after the court has advised the defendant of the dangers and disadvantages of acting pro se and has found the defendant competent to do so, the defendant waives such appointment."); *Briscoe* v. *State*, 606 A.2d 103, 107-08 (Del. 1992) (holding that a judge must advise defendant of the perils of acting *pro se* but not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

District of Columbia: *McClinton* v. *United States*, 817 A.2d 844, 849 (D.C. 2003) (holding that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open" and that a defendant's waiver "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and the circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter," but not requiring reversal simply because the judge does not give an instruction) (internal quotations and citations omitted), *petition for cert. filed*, No. 03-7227 (U.S. Oct. 29, 2003).

Florida: Fla. R. Crim. P. 3.111(d) (stating that before accepting a waiver of counsel, "the court shall advise the

defendant of the disadvantages and dangers of self-representation" but not requiring any specific inquiries); *Clary* v. *State*, 818 So. 2d 686 (Fla. Dist. Ct. App. 2002) (reversing for the failure to conduct a *Faretta*-style inquiry but not requiring any specific admonishments).

Georgia: *King* v. *State*, 226 Ga. App. 576, 584, 486 S.E.2d 904, 911 (1997) ("Each plea further recites that defendant 'freely and voluntarily waive[d] [her] right to counsel[;]' that she had read the accusation and the plea statement; and that the trial court was 'satisfied that the Defendant understands all [her] rights. . . .' We hold the record of these guilty pleas is adequate for an appellate court to affirm the trial court's determination, i.e., that defendant's waiver of the right to counsel was knowingly and intelligently made as part of a free and voluntary guilty plea.") (alterations and omissions in original), *rev'd on other grounds*, 270 Ga. 367, 509 S.E.2d 32 (1998).

Hawai'i: *State* v. *Merino*, 81 Haw. 198, 221-22, 915 P.2d 672, 695-96 (1996) (holding a judge did not need to "administer a criminal procedure course" before the defendant could waive counsel).

Idaho: Idaho Rules of Court, Crim. R. 44(a) ("Every defendant, who according to law is entitled to appointed counsel, shall have counsel assigned to represent the defendant, from initial appearance before the magistrate or district court, unless the defendant waives such appointment."); *State* v. *Maxey*, 125 Idaho 505, 509, 873 P.2d 150, 154 (1994) ("We are not convinced, however, that the judgments that confront a defendant who pleads guilty in a misdemeanor case are sufficiently difficult to warrant a requirement that the trial court must advise the defendant of the problems inherent in entering a plea without counsel.").

Illinois: Ill. Sup. Ct. R. 401 (providing that waiver of counsel shall occur in open court and only after the trial judge informs defendant of the nature of the charges, the minimum

and maximum sentences, and his right to counsel); *People* v. *Christensen*, 197 Ill. App. 3d 807, 814-15, 555 N.E.2d 422, 426-27 (1990) (holding that defendant properly waived her right to counsel because the judge followed the instructions of Rule 401 and did not give the specific admonishments now required by the Iowa Supreme Court).

Indiana: *Shelton* v. *State*, 181 Ind. App. 50, 55, 390 N.E.2d 1048, 1051 (1979) ("While it is better practice for the trial judge to emphasize the importance of the assistance of counsel and that counsel would assist the accused in evaluating the state's case against him, the possible defenses, if any, to the charge and the advantages and disadvantages of the alternative pleas, the failure to so advise is not per se reversible error. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. . . .").

Iowa: Iowa Code, R. Crim. P. 2.28 ("Every defendant who is an indigent person as defined in Iowa Code section 815.9, is entitled to have counsel appointed to represent the defendant at every stage of the proceedings from the defendant's initial appearance before the magistrate or the court through appeal, including probation revocation hearings, unless the defendant waives such appointment.").

Kansas: Kan. Stat. Ann. § 22-4503 (establishing the right to counsel for criminal defendants); *State* v. *Armstrong*, 240 Kan. 446, 453-54, 731 P.2d 249, 255-56 (1987) (applying a *Faretta*-style inquiry for a waiver at a trial, and expressing that the validity of a waiver "depends upon the particular facts and circumstances surrounding each case, including the accused's background, experience and conduct" and not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Kentucky: Ky. R. Crim. P. 3.05(2) ("If the crime of which the defendant is charged is punishable by confinement and the

defendant is financially unable to employ counsel, the judge shall appoint counsel to represent the defendant unless he or she elects to proceed without counsel."); *Dunn* v. *Commonwealth*, 573 S.W.2d 651, 652-53 (Ky. 1978) (rejecting defendant's argument that his waiver of counsel at trial was invalid because "the trial judge should have advised him of the seriousness of the charges and of the advisability of being represented by skilled counsel.").

Louisiana: Louisiana Stat. Ann., Code of Crim. P. art. 511 ("The accused in every instance has the right to defend himself and to have the assistance of counsel."); *State* v. *Strain*, 585 So. 2d 540, 543-44 (La. 1991) (holding that before a judge accepts a waiver of counsel at the guilty plea stage of a misdemeanor, the judge should determine on the record that the waiver is knowing and intelligent, and concluding that: "[d]etermining the defendant's understanding of his waiver of counsel in a guilty plea to an uncomplicated misdemeanor requires less judicial inquiry than determining his understanding of his waiver of counsel for a felony trial" and not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Maine: Me. R. Crim. P. 44(a)(1) ("[T]he court shall advise the defendant of the defendant's right to counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant elects to proceed without counsel or has sufficient means to employ counsel."); *State* v. *Morrison*, 567 A.2d 1350, 1352-53 (Me. 1990) (holding that questions of the validity of waiver of counsel should be resolved by case-specific, fact intensive inquiry and stating: "We refuse to create any kind of prophylactic rule by which the conviction of any *pro se* defendant would be automatically vacated, regardless of the particular facts and circumstances surrounding that defendant's waiver of counsel, if the trial court failed to give the defendant

Miranda-like warnings of the risks of self-representation and the benefits of counsel on the record.")

Maryland: Maryland Rules of Court, Crim. Causes, R. 4-215(b) ("If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until it determines, after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, that the defendant is knowingly and voluntarily waiving the right to counsel."); *Palacorolle* v. *State*, 239 Md. 416, 419-21, 211 A.2d 828, 829-31 (1965) (noting that "[t]he question of whether there has been a knowing and voluntary waiver is largely a question of fact to be determined as a preliminary matter by the trial judge," and noting that the defendant had not shown that there was a defense that could have been asserted in his case).

Massachusetts: Mass. Rules of Court, R. Sup. Jud. Ct. 3:10 (stating that a defendant shall complete a waiver of counsel form, which does not include a statement of the risks of forgoing counsel); *Commonwealth* v. *Martin*, 425 Mass. 718, 719-20, 683 N.E.2d 280, 282 (1997) ("We have not prescribed the questions that a judge must pose to an accused who desires to represent himself nor is there any particular piece of information that is essential to an effective waiver of counsel.") (internal quotations omitted).

Michigan: Mich. Comp. Laws Ann. § 763.1 ("On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself . . . ."); *People* v. *Dunn*, 380 Mich. 693, 697, 158 N.W.2d 404, 405-06 (1968) (holding that once a defendant was informed of his right to counsel and the charges and then pleaded guilty, he had validly waived his right to counsel); *People* v. *Gonzales*, 179 Mich. App. 477, 480, 446 N.W.2d 296, 298 (1989) ("In district court, a valid waiver of counsel is effected, after the court's presentation of the defendant's right to counsel . . . upon the defendant's

express indication to the court that he chooses to forego the benefits of counsel.").

Minnesota: 49 Minn. Stat. Ann., R. Crim. P. 5.02(3)-(4) (stating that the judge shall not accept a waiver of counsel in a misdemeanor case unless satisfied that it is knowing and intelligent and stating that a judge shall not accept a waiver of counsel in a felony or gross misdemeanor case without first giving the defendant numerous instruction); *State* v. *Rubin*, 409 N.W.2d 504, 506 (Minn. 1987) ("As we interpret R. 5.02 and the comment to the rule, a trial court may not accept a guilty plea to a felony or gross misdemeanor charge made by an unrepresented defendant if the defendant has not consulted with counsel about waiving counsel and pleading guilty.")

Mississippi: Miss. Rules of Court, R. 8.05(3)-(5) (stating that the court may accept waiver of counsel upon a determination that a knowing and intelligent waiver has been granted with an understanding of the following instructions: that the court will not relax evidentiary or procedural rules, nor courtroom protocol for the defendant, that the defendant is bound to conduct himself/herself according to the same rules as an attorney, that these rules are complex, that his/her ability to defend himself/herself will be hampered absent legal advice, and that proceeding pro se usually increases the likelihood of an unfavorable outcome but not requiring that the *judge* give any specific admonishments that would satisfy the Iowa Supreme Court's rule); *Matthews* v. *State* 394 So. 2d 304, 309 (Miss. 1981) (defendant may waive right to counsel "at any time, before or during the trial, but it must be made with a full understanding of its disadvantages and consequences").

Missouri: Mo. Ann. Stat. § 600.051 (stating that a judge may accept a signed waiver of counsel if the defendant has been informed of the nature of the charges, that the defendant has right to trial by jury, the maximum and minimum permissible punishment, that any recommendations from the prosecutor is not binding, that the defendant will most likely

be imprisoned, and that if indigent the defendant has a right to appointed counsel and not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Montana: Mont. Code Ann. § 46-8-102 ("A defendant may waive the right to counsel when the court ascertains that the waiver is made knowingly, voluntarily, and intelligently."); see generally *State* v. *Markuson*, 317 Mont. 43, 75 P.3d 298 (2003) (rejecting the defendant's argument that he had not validly waived his right to counsel because the judge had failed to advise him of the dangers and disadvantages of self-representation); *State* v. *Wolfe*, 317 Mont. 173, 75 P.3d 1271 (2003) (same).

Nebraska: *State* v. *Green*, 185 Neb. 673, 178 N.W.2d 271 (1970) (upholding a waiver of counsel in a case where defendant was not warned that a defense attorney could give an independent perspective or that a defense attorney might recognize defenses he would not).

Nevada: Nev. Rev. Stat. 178.397 ("Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before a magistrate or the court through appeal, unless he waives such appointment."); *Beals* v. *State*, 106 Nev. 729, 732, 802 P.2d 2, 4 (1990) (per curiam) ("The court should determine if the waiver is knowingly and intelligently made with a penetrating and comprehensive examination of the waiver and the circumstances surrounding it" but not requiring any specific admonishments) (internal quotations omitted).

New Hampshire: N.H. Rev. Stat. Ann. § 604-A:2(I) ("Unless the defendant waives the appointment of counsel, if the defendant indicates to the court that he is financially unable to obtain counsel, the court shall instruct the defendant to complete a financial affidavit in such form as designated by

the unit of cost containment."); *State* v. *Herbert*, 108 N.H. 332, 334-35, 235 A.2d 524, 526-27 (1967) (noting that deciding whether waiver was valid is a fact-intensive process and not requiring judge to give any specific admonishments).

New Jersey: *State* v. *Williams*, 663 A.2d 1378, 1388-89 (N.J. Super. Ct. Law Div. 1995) ("Defendant should be informed of the nature of the charges he faces, the statutory defenses to those charges, the possible range of allowable punishment, the technical problems he may face in acting as counsel . . . ." *except*, "when the record indicates that defendant actually understands the risks of proceeding *pro se*.")

New Mexico: *State* v. *Montler*, 85 N.M. 60, 60-61, 509 P.2d 252, 252-53 (1973) ("with regard to waiver of counsel, no hard and fast rule can be laid down as to what must be stated in each case in order to adequately explain an accused's rights before permitting him to waive counsel. Each case must be decided on its own peculiar facts which shall include consideration of the background, education, training, experience and conduct of the accused").

New York: *People* v. *Whitted*, 496 N.Y.S.2d 767, 770 (N.Y. App. Div. 1985) ("Although the searching inquiry required to establish a knowing and voluntary decision to proceed *pro se* can best be established by an appropriate colloquy . . . there is no authority for the proposition that such a colloquy is the exclusive method that may be used to establish the effectiveness of the waiver.") (citation omitted); *People* v. *White*, 451 N.Y.S.2d 57, 61 (N.Y. 1982) (court may grant waiver of counsel only where it has first "undertaken a sufficiently searching inquiry for it to be reasonably assured that the defendant appreciated the 'dangers and disadvantages' of giving up the fundamental right to counsel").

North Carolina: N.C. R. Indigent Def. Servs. R. 1.6(a) ("[W]aiver of counsel shall be effective only if the court finds

of record that at the time of waiver the indigent person acted with full awareness of his or her rights and of the consequences of the waiver. In making such a finding, the court shall follow the requirements of G.S. 15A-1242 and shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the matter."); N.C. Gen. Stat. § 15A-1242 (waiver of counsel contingent upon trial judge being satisfied, after thorough inquiry that: defendant (1) has been advised of right to assistance and assignment of counsel; (2) understands and appreciates the consequences of waiver; and (3) comprehends the nature of charges, proceedings, and range of permissible punishment, but not requiring any specific admonishments that would satisfy the Iowa Supreme Court's rule); *State* v. *Fulp*, 355 N.C. 171, 176-77, 558 S.E.2d 156, 159-60 (2002) (upholding the use of prior conviction for enhancement even though there was no evidence that prior judge gave the specific admonishments now required by the Iowa Supreme Court).

North Dakota: N.D. R. Crim. P., R. 44(a) (stating that, "[a]bsent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all felony cases." and recognizing that this right applies to non-felony cases where a magistrate has not determined that a sentence upon conviction will not include imprisonment); *State* v. *Hendrick*, 543 N.W.2d 217, 221 (N.D. 1996) (treating the question of whether a waiver of counsel was voluntary as a fact-intensive question and upholding a waiver where there was no evidence that the judge gave the specific admonishments now required by the Iowa Supreme Court).

Ohio: Ohio Rev. Code Ann. § 2941.021 ("Any criminal offense which is not punishable by death or life imprisonment

may be prosecuted by information filed in the common pleas court by the prosecuting attorney if the defendant, after he has been advised by the court of the nature of the charge against him and of his rights under the constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court prosecution by indictment."); *State* v. *Welch*, 28 Ohio St. 2d 31, 32-33, 274 N.E.2d 756, 757-58 (1971) (remanding a case for a hearing to determine whether a defendant knowingly and intelligently waived his right to counsel in a prior case but not requiring any specific inquiries or admonishments that would satisfy the Iowa Supreme Court's rule on remand).

Oklahoma: Okla. Stat. Ann. tit. 22, § 251 ("When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had."); *Huckabay* v. *Page*, 438 P.2d 645, 647 (Okla. Crim. App. 1968) (upholding the waiver of counsel at a guilty plea when defendant was informed of his right to counsel and the possible punishment range); *Fitzgerald* v. *State*, 972 P.2d 1157, 1162 (Okla. Crim. App. 1998) ("This Court has consistently refused to impose a list of factors on trial courts, holding instead that a valid waiver is determined from the total circumstances of each case.")

Oregon: *State* v. *Meyrick*, 313 Or. 125, 134, 831 P.2d 666, 671 (1992) (en banc) (holding that the Oregon Constitution's provision of the right to counsel "does not require a catechism by the trial court, however, before the right to counsel may be validly waived by a defendant. The failure of a trial court to impart a particular piece of information to a defendant will not, of itself, require reversal of a conviction if the record as a whole shows that the defendant knew of his or her right to

counsel and that the waiver of counsel was an intentional relinquishment or abandonment of that known right.")

Pennsylvania: *Commonwealth* v. *Payson*, 723 A.2d 695, 700 (Pa. Super. Ct 1998) (indicating that an effective waiver of counsel requires a colloquy involving inquiry into the following areas: (1) the defendant understands he has the right to counsel; (2) the defendant understands the nature of the charges against him; (3) the defendant is aware of the sentencing range; (4) the defendant understands he will be bound by all the normal rules of procedure and that counsel would be familiar with these rules; (5) defendant understands that there are possible defenses to these charges which counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and (6) the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, the objection to these errors may be lost permanently).

Rhode Island: R.I. R. Super. Ct. 44 ("If a defendant appears in Superior Court without counsel, the court shall advise the defendant of his or her right to counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant is able to obtain his or her own counsel or elects to proceed without counsel."); *State* v. *Briggs*, 787 A.2d 479, 485 (R.I. 2001) (applying a totality of the circumstances test to the question of waiver of counsel and not mandating any specific admonishments)

South Carolina: S.C. Code Ann. § 17-3-10 (Recognizing the right to counsel as required by the United States Constitution.) *Watts* v. *State*, 347 S.C. 399, 402-03 556 S.E.2d 368, 370-71 (2001) (holding that "[i]n order to waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation" and finding that the trial judge failed to apprise the defendant of the dangers of self-representation.)

(internal quotations omitted); *Gardner* v. *State*, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87(S.C. 2002)(finding an "absolute failure of the plea judge to ask Petitioner for a waiver and to apprise him of the dangers of appearing *pro se*" the South Carolina supreme court looked to the defendant's background to decide if the defendant had sufficient background to understanding the dangers of self-representation).

South Dakota: *State* v. *Cashman*, 491 N.W.2d 462 (S.D. 1992) (holding that when a guilty plea is entered, a full *Faretta* colloquy is not required and not requiring the specific admonishments now required by the Iowa Supreme Court).

Tennessee: Tenn. R. Crim. P. 44(a) ("The court shall . . . determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience and conduct of the accused and such other matters as the court may deem appropriate." Furthermore, a written waiver is required and the court must "spread [the waiver] upon the minutes of the court and [make the waiver] a part of the record of the cause."); *State* v. *Armes*, 673 S.W.2d 174 (Tenn. Crim. App. 1984) (holding that the waiver must be in writing in order to be valid but not requiring the specific admonishments required by the Iowa Supreme Court).

Texas: Tex. Crim. Proc. Code Ann. art. 1.051(g) ("If a defendant wishes to waive his right to counsel, the court shall advise him of the dangers and disadvantages of self-representation."); *Hatten* v. *State*, 71 S.W.3d 332, 334 (Tex. Crim. App. 2002) (holding that a *Faretta* style inquiry is not required for guilty pleas).

Utah: Utah R. Crim. P. 8(a) ("A defendant charged with a public offense has the right to self representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty."); *State* v. *Arguelles*, 63 P.3d 731 (Utah 2003) (stating that a *Faretta*-style inquiry is preferred, but holding that the

waiver was valid nonetheless under a totality-of-the-circumstances test).

Vermont: Vt. Stat. Ann. tit. 13, § 5237 (A defendant may waive the right to counsel, in writing, or by other record, "if the court, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with the English language, and the complexity of the crime involved.") *State* v. *Bean*, 163 Vt. 456, 460-61, 658 A.2d 940, 943 (1995) (holding that while waiver should generally appear in the record, "in a relatively close case the record may be supplemented to show defendant's actual knowledge and understanding" and not requiring specific admonishments).

Virginia: *Edwards* v. *Commonwealth*, 21 Va. App. 116, 124, 462 S.E.2d 566, 570 (1995) ("Signing a waiver form does not alone guarantee affirmance of a conviction, and failure to give the specific warnings suggested by appellant does not alone assure reversal of the conviction. All of the circumstances as shown by the record must be considered and an ultimate determination made whether the accused knowingly, competently, and intelligently waived his right to be represented by an attorney.").

Washington: Wash. Crim. R. Limited Jurisdiction 4.1(c)(2) ("If the defendant chooses to proceed without a lawyer, the court shall determine on the record that the waiver is made voluntarily, competently and with knowledge of the consequences."); *State* v. *Meacham*, 98 Wash. App. 1040 (1999), *available at* 1999 WL 1222707, at * 3, (holding that while a *Faretta*-style inquiry is preferred, absent a colloquy a waiver can be knowing if the record indicates "that the defendant had at least a minimal knowledge of what the task of self-representation entails, including that the defendant understood the seriousness of the charges and knew the maximum penalty.")

West Virginia: W. Va. Code §§ 62-3-1, 62-3-1a (providing for the right to counsel, upon request and providing waiver forms that *pro se* defendants must sign when entering guilty plea, which states only that they understand their right to counsel, the charges against them, and potential penalties that may result); *State* v. *Armstrong*, 175 W.Va. 381, 388, 332 S.E.2d 837, 843 (1985) (holding that express waiver of right to counsel—through a waiver form which states that defendant understands his right to counsel—completed at time of guilty plea was sufficient for the conviction to operate as an enhancement in a subsequent DUI conviction), *overruled on other grounds by State* v. *Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994).

Wisconsin: Wis. Stat. § 970.02(1)(b) (requiring trial judge to inform defendant of right to appointment of counsel); *State* v. *Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721 (Wis. 1997) (holding that to prove a knowing and voluntary waiver of a defendant's right to counsel in any case in which defendant seeks to proceed *pro se*, "the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him."); *State* v. *Polak*, 254 Wis. 2d 585, 600, 646 N.W.2d 845, 852 (Wis. Ct. App. 2002) (holding that oral colloquy, supplemented by waiver forms signed by defendant was sufficient to satisfy the *Klessig* test).

Wyoming: Wyo. Stat. Ann. § 7-6-107 ("A person who has been advised of his rights under W.S. 7-6-105 may waive any right provided by this act if at the time of or after waiver, the court finds that the person has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise made according to law. Before making its findings, the court shall consider such factors as the person's age,

education, familiarity with the English language and the complexity of the crime involved."); *Mapp* v. *State*, 953 P.2d 140, 144 (Wyo. 1998) ("district court's failure to conduct a complete inquiry on the record does not require reversal when the surrounding facts and circumstances demonstrate a knowing and intelligent waiver").

No. 02-1541

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In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF *AMICUS CURIAE* OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

The judge at a plea colloquy advised a misdemeanor defendant of the drunk-driving charge, its elements, its penalties, and his right to an attorney. The non-indigent *pro se* defendant chose not to retain a lawyer, waived his right to counsel, and admitted every element of the offense. Years later, can the defendant use the Sixth Amendment to collaterally attack the plea colloquy for failure to offer additional advice on precisely how a lawyer might have helped him?

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INTEREST OF *AMICUS CURIAE*[1]

The National District Attorneys Association (NDAA) is a nonprofit corporation and the sole national membership organization representing local prosecuting attorneys in the United States. Since its founding in 1950, NDAA's education and training programs, publications, and *amicus curiae* briefs have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People." Local prosecutors handle the overwhelming majority of criminal prosecutions in this country. The NDAA and its members have a compelling interest in the outcome of this case because of the large practical impact it will have on the timeliness and finality of guilty pleas and the enforcement of recidivist statutes across the nation.

SUMMARY OF ARGUMENT

The Iowa Supreme Court's and the Ninth Circuit's novel reading of the Sixth Amendment, in addition to being legally wrong for the reasons set forth by Petitioner, suffers from two grave practical flaws. First, it undermines many recidivist statutes of great importance, particularly statutes targeted at drunk driving and

[1] The parties have consented to the filing of this brief. Assistant Attorney General Bruce Kempkes of the Iowa Department of Justice, counsel for Petitioner, contributed in part to the writing of this brief. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

domestic violence. This result hinders the incapacitation, deterrence, and possibly rehabilitation of these offenders. Second, the ruling below reverses the burden of proof, which as this Court has recognized requires defendants to prove that their waivers of counsel were unknowing or involuntary. The ruling below, in contrast, requires prosecutors to bear the often impossible burden of searching for transcripts of misdemeanor plea colloquies that may never have been made or have long since been destroyed. This result unsettles and upsets countless guilty pleas that were entered years ago, disrupting finality and granting recidivists a windfall of lighter sentences.

ARGUMENT

THE IOWA COURT'S DECISION UNDERMINES RECIDIVIST STATUTES AND THE FINALITY OF GUILTY PLEAS AND ERRONEOUSLY SHIFTS THE BURDEN OF PROOF ON COLLATERAL ATTACK TO THE PROSECUTION.

A. Many Misdemeanor Defendants Have Entered Guilty Pleas Without the Assistance of Counsel. Undermining the Finality of These Guilty Pleas Impairs Enforcement of Recidivist Statutes for Drunk Driving, Domestic Violence, and Other Crimes.

Although frequently classified as misdemeanors, drunk driving and domestic violence implicate serious public problems and important public policies. In the last fifty years, society and the courts have witnessed an explosion of drunk driving cases. Drunk driving is "an urgent, nationwide problem of staggering proportion." *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001). *See*

City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000); *Craig v. Boren*, 429 U.S. 190, 225 (1976) (Rehnquist, J., dissenting); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 346 n.8 (7th Cir. 1983) (referring to Pennsylvania report that drunk driving "has become perhaps one of the most dangerous and costly forms of criminal activity"), *cert. denied*, 465 U.S. 1068 (1984). Drunk driving all too frequently results in disaster and death. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at tbl. 3.106 (2002) (17,448 people died in alcohol-related motor vehicle crashes in 2001). To curb this threat, states have enacted legislation providing greater punishment for repeat drunk drivers.

Like drunk driving, the battering of women all too frequently results in disaster. It is "the single largest cause of injury to women in the United States." Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (internal quotation marks omitted). Four million women are beaten in the United States annually. Joan Zorza, *Women Battering: High Costs and the State of the Law*, CLEARINGHOUSE REV. special issue 383 (1994), *reprinted in* NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 11, 15 (2001). "The injuries that all battered women receive are at least as severe as those suffered in 90 percent of violent felonies, although the overwhelming number of domestic-violence injuries is considered to be only misdemeanors in most states." *Id.* More than thirty percent of women killed – three women per day – are murdered by their husbands, and women murdered by intimate partners frequently experience brutal deaths after years of violence. *Id.* at 16. Children

who witness battering suffer from fear, anxiety, nightmares, and behavioral problems. Stephen E. Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50(2) JUVENILE & FAMILY CT. J. 1 (1999), *reprinted in* NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 340, 341-42 (2001). To fight this pattern of violence, states have enacted laws that increase punishment for repeat domestic abusers.

Drunk driving and domestic violence are classified as misdemeanors in many states. *See, e.g.,* Iowa Code § 321J.2(2)(a), (b) (OWI, first and second offenses), § 708.2A (domestic abuse assault) (1999). Most of these cases, particularly those involving first-time drunk drivers, are resolved by guilty pleas. *State v. Novak*, 318 N.W.2d 364, 369 (Wis. 1982); *see* Scott County, Iowa, Scott County Community Jail and Alternatives Phase One Study: Section 5: Scott County Prosecutorial and Judicial Trends, at 5.9 (Nov. 15, 2001), *available on-line at* http://www.scottcountyiowa.com/cjaac/documents.html (last visited Nov. 10, 2003) (reporting that of the first- and second-offense OWI misdemeanor cases in the years 1994 to 2001, between 545 and 864 were resolved by guilty pleas each year, compared with 10 or fewer each year that were resolved by trial); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 452 tbl. 5.55 (2002) (reporting that most felony defendants who were convicted of felonies or misdemeanors in the nation's 75 largest urban counties in 1998 were convicted by plea rather than trial).

A substantial number of those guilty pleas were, like Respondent's, made without the assistance of counsel. *See, e.g., Nichols v. United States*, 511 U.S. 738, 741 (1994) (defendant entered *pro se* guilty plea to misdemeanor OWI

charge); *United States v. Smith*, 171 F.3d 617, 619 (8th Cir. 1999) (defendant entered *pro se* guilty plea to simple misdemeanor assault); *State v. Garrity*, 708 So.2d 1096, 1097 (La. App. 1998) (defendant entered *pro se* guilty plea to misdemeanor OWI charge); CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES 1, 7 tbl. 14 (Bureau of Justice Statistics, Nov. 2000) (nearly 30% of inmates accused of public order offenses in the nation's seventy-five largest counties report self-representation); *see also* John M. Greacen, *An Administrator's Perspective: The Impact of Self-Represented Litigants on Trial Courts – Testing Our Stereotypes Against Real Data*, JUDGES' J., Summer 2002, at 32, 32 ("By now, everyone in the judicial branch in every state knows that we are experiencing an explosion of unrepresented persons appearing in the courts of general jurisdiction of this country"); John M. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 297, 297 (1998) ("Across America, there has been a recent increase in the number of *pro se* . . . litigants in the federal and state court systems").

Under the decision below, every one of those guilty pleas is at risk of being overturned whenever the defendant comes into court as a repeat offender. Upsetting these convictions will undermine recidivist statutes' aims of deterring and incapacitating dangerous repeat offenders, leading to more drunk-driving and domestic-violence deaths and injuries. *See generally Ewing v. California*, 538 U.S. 11, __, 123 S. Ct. 1179, 1188 (2003) (recidivist statutes serve both to incapacitate and to deter); *Parke v. Raley*, 506 U.S. 20, 26 (1992) ("Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times"). Sentencing courts would be forced to ignore many recidivists' earlier

convictions. This result would under-punish and fail to deter or incapacitate dangerous recidivists.

Drunk drivers and wife beaters are usually not one-time offenders, but rather alcoholics or chronic abusers. Harvey J. Hoffman, *Healing Drunk Drivers: Michigan's OUIL/Sobriety Drug Courts*, MICH. BAR J., Jan. 2003, at 28, 30 ("Not surprisingly, alcoholic drivers offend over and over"); James L. Nichols, *Treatment Versus Deterrence*, 14 ALCOHOL HEALTH & RES. WORLD 44 (1990); *see also* LENORE E. WALKER, THE BATTERED WOMAN 55-70 (1979) (describing domestic violence as a cycle of tension-building, battering, and reconciliation that repeats over prolonged periods). A plea of guilty to either offense can put a defendant on the road to rehabilitation and take him permanently away from the criminal justice system. Similarly, a prosecution and guilty plea may deter offenders from engaging in their conduct again. Jeffrey Edleson & Maryann Syers, *The Relative Effectiveness of Group Treatments for Men Who Batter*, SOC. WORK RES. & ABSTRACTS, June 1990, at 10 (finding that court-ordered treatment is effective in reducing recidivism among batterers); Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 219 (1999) ("after one time through the process, batterers are more acutely aware of the threat of certain prosecution, which can act as an even more effective deterrent than mere arrest); Richard M. Tolman & Arlene Weisz, *Coordinated Community Intervention for Domestic Violence: The Effects of Arrest and Prosecution on Recidivism of Woman Abuse Perpetrators*, 41 CRIME & DELINQ. 481 (1995) (finding that the combination of arrest and prosecution prevented and deterred recidivism among male batterers). Conversely,

drunk drivers who escape punishment are highly likely to reoffend. Jiang Yu & William R. Williford, *Drunk-driving Recidivism: Predicting Factors from Arrest Context and Case Disposition*, 56 J. STUD. ON ALCOHOL 60 (1995).

Impeding future pleas may also hinder rehabilitation of these offenders. A guilty plea may sometimes amount to the first step down the road to rehabilitation. *See Brady v. United States*, 397 U.S. 742, 753 (1970) (endorsing the guilty plea as a signal that the defendant "is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary"); *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992) ("[g]enerally, a guilty plea is a positive first step to rehabilitation"); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2001) (providing for less severe sentence "[i]f the defendant clearly demonstrates acceptance of his responsibility for his offense"). In the same vein, twelve-step programs such as Alcoholics Anonymous require admitting that one has a problem as an essential step to recovery. ALCOHOLICS ANONYMOUS, TWELVE STEPS AND TWELVE TRADITIONS 55-62 (1981) (requiring alcoholics to confess their drinking problems to others as a way of puncturing their rationalizations, illusions, and wishful thinking). Even an insincere guilty plea may be a step towards true acceptance of responsibility, and it can also bring vindication, healing, closure, and finality to victims and the community at large. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1398, 1400, 1406-07 (2003). Conversely, some defense counsel may protract litigation and encourage clients to remain in

denial rather than coming clean and admitting guilt in a guilty plea. Encouraging defense counsel to foster this adversarial stance may harden defendants' denial, making them less amenable to treatment later on. *See id.* at 1397, 1404-06.

In addition, guilty pleas move offenders into court-ordered treatment more quickly. These treatment programs can reduce recidivism by drunk drivers and domestic abusers, particularly when coupled with punishment or the threat of punishment. *See* Huey-tsyh Chen et al., *Evaluating the Effectiveness of a Court Sponsored Abuser Treatment Program*, 4 J. FAM. VIOLENCE 309 (1989) (finding that a domestic-abuse treatment program reduced recidivism rates to 10% over the next 14 months); L. Kevin Hamberger & James E. Hastings, *Skills Training for Treatment of Spouse Abusers: An Outcome Study*, 3 J. FAM. VIOLENCE 121, 126 (1988) (finding that a domestic-abuse treatment program reduced recidivism from 47% to 28%); Christopher M. Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. FAM. VIOLENCE 263, 278-79 (1998) (finding that prosecution and court-mandated domestic-violence treatment lowered recidivism significantly); Nichols, *supra*, 14 ALCOHOL HEALTH & RES. WORLD 44 (finding that education programs reduce drunk-driving recidivism among first offenders and nonproblem drinkers and that legal sanctions such as license suspension are effective in deterring and incapacitating drunk drivers); W. Larry Campbell, *An Alternative for Drunk Drivers*, 10 ADDICTION & RECOVERY 46 (1990) (finding that court-ordered alcohol counseling coupled with an education program reduced drunk-driving recidivism). Delaying entry of a guilty plea, in contrast,

may leave the untreated defendant free on bail, particularly because these misdemeanors are likely to carry low bails and no pretrial detention. While free on bail, the defendant may well drive drunk or abuse again.

The decision below, by impeding knowing, voluntary guilty pleas, undermines the government's interest in quickly deterring, incapacitating, and treating recidivists generally and drunk drivers and domestic abusers in particular.

B. The Iowa Court Erroneously Placed the Burden on the Prosecution to Prove That Respondent, Who Had Expressly Declined the Assistance of Counsel, Knowingly Waived the Right to Counsel When He Pleaded Guilty to OWI in 1996.

The decision below required the prosecution in collateral proceedings to prove that a *pro se* defendant knowingly waived the right to counsel before entering a guilty plea, even though he expressly declined the assistance of counsel. (Pet. App. 18-19.) The Iowa court's interpretation of the Sixth Amendment contravenes this Court's holdings.

When the record contains no indication that a *pro se* defendant declined the assistance of counsel in entering a guilty plea, on collateral attack the prosecution bears the burden of proving a knowing waiver of the right to counsel. Conversely, when the record shows that a *pro se* criminal defendant knew of that right but desired to proceed without the assistance of counsel, on collateral attack the criminal defendant bears the burden of proving that he did not knowingly waive the right to counsel. These are the teachings of *Moore v. Michigan*, 355 U.S.

155, 161-62 (1957) and *Carnley v. Cochran*, 369 U.S. 506, 517 (1962). *Teske v. State*, 507 So.2d 569, 571-72 (Ala. Cr. App. 1987); *State v. Hamilton*, 725 P.2d 590, 592 (N.M. Ct. App. 1986); C. Allen Parker, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 382 n.124 (1982).

The court below ignored those teachings. Without citing any authority, the court simply placed the burden upon the prosecution to show that Respondent – who had expressly declined the assistance of counsel for his 1996 OWI offense – knowingly waived his right to counsel. (Pet. App. 18-19.)

This misplaced burden of proof creates enormous practical problems for prosecutors, who cannot retrieve records that never existed or were destroyed long ago. Though there happens to have been a transcript of the earlier plea colloquy in this case, this misplaced burden of proof will cause prosecutors great practical difficulties in future cases in which transcripts were never made or have long since been destroyed or lost. State-court waivers of counsel and guilty-plea proceedings in misdemeanor cases commonly go unreported. Even if the proceedings are reported, court personnel routinely destroy transcripts, audiotapes, and other documents as part of record-retention policies. *Nichols v. United States*, 511 U.S. 738, 748 (1994) ("a large number of misdemeanor convictions take place in police or justice courts which are not courts of record"; thus, "without a drastic change in the procedures of these courts, there would be no way to memorialize" a warning "that a misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime"); *accord United States v. Hartsock*, 2003 WL

22330976, at *7 (1st Cir. Oct. 10, 2003); *see, e.g., Moore v. Michigan*, 355 U.S. at 157; *United States ex rel. Ackerman v. Russell*, 388 F.2d 21, 24 (3rd Cir. 1968); *United States v. Bethurum*, 213 F. Supp.2d 679, 683-84 (N.D. Tex. 2002); Pam Louwagie, *Court-hearing Transcripts No Longer Mandatory*, MINNEAPOLIS-ST. PAUL STAR-TRIBUNE, at 5B (Nov. 4, 2003) (reporting that under a Minnesota Supreme Court order, most felony and gross misdemeanor pleas and sentences will be audiotaped but not transcribed unless a court orders it or someone else pays for the transcript). *See generally* NAT'L CENTER FOR STATE COURTS, SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES IN 12 URBAN JURISDICTIONS 111 (1992) (paperwork generated by traffic cases, the single largest category of cases in state trial courts, places the most serious burden upon court administration); DONALD S. SKUPSKY & JOHN C. MONTANA, LAW, RECORDS AND INFORMATION MANAGEMENT 131 (1994) (record-retention programs try to balance the duty to preserve evidence against the need to eliminate valueless records, reduce space requirements, and reduce costs). There are no national standards, guidelines, or formats for the retention of records, leaving each state to define its own schedule. THOMAS G. DIBBLE, A GUIDE TO COURT RECORDS MANAGEMENT 44 (Nat'l Center for State Courts 1986). Thus, some states keep no transcripts of plea hearings in misdemeanor cases, and others routinely destroy them after a limited period of time. In states with no clear policies or a variety of policies, it may be impossible to know ahead of time what records are available. The result may be futile searches for records that may never have existed or may have been destroyed long ago.

In *Moore v. Michigan*, this Court alleviated these problems by allowing any indication of waiver to shift the burden to the defense. Prosecutors who seek to use a defendant's prior conviction to enhance punishment may rely upon certified copies of court records that reveal that the conviction resulted from a guilty plea at which the defendant declined the assistance of counsel. If the defendant in a collateral proceeding then alleges that he did not know of his right to counsel in entering the plea or that he did not knowingly waive that right, he bears the burden of proof. An alleged denial of the right to counsel that appears on the face of court records is a simple matter to prove. As this Court has suggested, there is a prima facie constitutional violation where "the certified records of [a prior] conviction on their face raise a presumption that petitioner was denied his right to counsel. . . . [A court cannot p]resum[e] waiver of counsel from a silent record. . . ." *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967). But if the docket sheet, judgment roll, or minute orders indicate that a defendant waived or declined counsel, any further inquiry behind the face of the records would be much more burdensome. Thus, this Court has been wary of allowing collateral attacks on prior convictions to go beyond the face of the official court records. "Ease of administration . . . supports the distinction. . . . [F]ailure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But . . . failure to assure that a guilty plea was voluntary[] would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." *Custis v. United States*, 511 U.S. 485, 496 (1994).

In light of these difficulties, shifting the burden of proof to the prosecution would greatly hinder or even preclude effective enforcement of recidivist statutes. It is hard enough to find witnesses who can recall events occurring in the recent past. It is all but impossible to find them years later. As one commentator explains, a collateral attack on a guilty plea may arise years later and "require[] examining incomplete records from far away jurisdictions in cases long ago closed and forgotten. The practical problems of finding the facts to support or refute a claim about the validity of a plea in such conditions are immense." 2 DAVID ROSSMAN, CRIMINAL LAW ADVOCACY: GUILTY PLEAS ¶ 6.06, at 6-51 (2003).

United States v. Hartsock, 2003 WL 22330976 (1st Cir. Oct. 10, 2003) considered these practical problems in the context of 18 U.S.C. § 922(g)(9). That statute restricts the carrying of weapons by anyone convicted of a misdemeanor crime of domestic violence, except when the prior conviction occurred without counsel or without a knowing and intelligent waiver of counsel. At issue was whether prosecutors or defendants bear the burden of proving the lack-of-counsel exception.

After observing that State authorities had destroyed the plea transcripts of the defendant's 1992 domestic assault conviction during routine space-saving procedures, *Hartsock, supra,* at *1, the First Circuit held that defendants seeking to take advantage of the exception must prove that they never knowingly and intelligently waived the right to counsel. *Id.* at *7. Placing the burden of proof on the prosecution would substantially hamper its ability to enforce and effectuate the statute, because "the prosecution will often not be able to offer any proof beyond the record of the prior conviction. State courts routinely

destroy supporting records. As such, requiring the [prosecution] to shoulder the burden of persuasion would ... place "'an impossible burden on the prosecution to establish the existence of facts within the special knowledge of the defendant.'" *Id.* (quoting 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 1.8 (1986)).

The First Circuit's analysis illustrates why the decision below would create a large loophole for recidivists to exploit and thereby defeat society's interest in imposing greater punishment for repeat violators of the laws. *See generally Lockyer v. Andrade*, 538 U.S. 63, __, 123 S. Ct. 1166, 1177-78 (2003); *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

In placing the burden upon defendants in collateral proceedings to show an unknowing waiver when the record discloses that they declined the assistance of counsel, this Court in *Moore* and *Carnley* recognized the importance of promoting the finality of judgments. This interest in finality supports giving a prior judgment its "'normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgment.'" *Custis v. United States*, 511 U.S. 485, 497 (1994) (quoting *Parke v. Raley*, 506 U.S. 20, 30 (1992)). "Inroads on the concepts of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. *United States v. Addonizio*, 442 U.S. 178, 184 n. 11 (1979). The decision below – in which Respondent successfully mounted a collateral attack upon a *pro se* guilty plea without offering any evidence that he lacked knowledge about the advantages of counsel when he entered that plea

– does little to promote public confidence in final judgments or the court system.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks this Court to reverse the judgment of the Supreme Court of Iowa.

Respectfully submitted,

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In the Supreme Court of the United States

STATE OF IOWA, PETITIONER

v.

FELIPE EDGARDO TOVAR

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent's uncounseled plea of guilty to a state-law misdemeanor offense was invalid because the trial court failed to provide respondent with sufficient information and advice about the potential advantages of representation by counsel.

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In the Supreme Court of the United States

No. 02-1541

STATE OF IOWA, PETITIONER

v.

FELIPE EDGARDO TOVAR

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The issue in this case is whether respondent's uncounseled plea of guilty to a state-law misdemeanor offense was obtained in violation of the Sixth Amendment because the trial judge failed to provide respondent with sufficient information and advice about the potential advantages of representation by counsel. The resolution of that issue will affect the nature of the colloquy that must be conducted when an uncounseled defendant enters a guilty plea in federal court. This Court's disposition of the case may also affect the use of prior uncounseled guilty pleas as predicates for federal offenses in which a prior conviction is an element of the crime (see, *e.g.*, 18 U.S.C. 922(g)(1) and (9)), or for recidivist enhancements imposed on federal defendants under statute (see, *e.g.*, 18 U.S.C. 924(e)), or the Sentencing Guidelines. The United States therefore has a substantial interest in this case.

STATEMENT

1. In November 1996, respondent Felipe Edgardo Tovar was charged in Iowa state court with operating a vehicle

while intoxicated (OWI), in violation of Iowa Code Ann. § 321J.2 (West 1997). Under Iowa law, a person is guilty of an OWI offense if he operates a motor vehicle within the State either (a) "[w]hile under the influence of an alcoholic beverage or other drug or a combination of such substances," or (b) "[w]hile having an alcohol concentration * * * of .10 or more." *Id.* § 321J.2(1)(a) and (b).

On November 18, 1996, respondent appeared before the Story County district court along with four other individuals charged with misdemeanor offenses. J.A. 11; Pet. App. 4. The trial court noted at the outset of the hearing that respondent had waived application for appointed counsel, and respondent confirmed that he wished to represent himself at the plea proceeding. J.A. 8-9. The court proposed to conduct plea proceedings for the five cases jointly, and each of the individuals indicated that he did not object to that course of action. J.A. 11. Respondent stated that he was 21 years old and a student in college; that he could read and write the English language; that he was not under the influence of drugs or alcohol; and that he had not been promised anything or threatened in any way in order to induce him to plead guilty. J.A. 12-13.

During the plea colloquy, the trial court explained to the defendants as a group the rights that they would be giving up if they entered pleas of guilty. The court first explained that "[i]f you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a trial of any kind on your charge." J.A. 15. The court next informed the defendants that a person who pleaded not guilty and went to trial "would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your

behalf. But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial." J.A. 16. The court further explained that a defendant who pleaded not guilty "would have a privilege against self-incrimination" and could neither be forced to testify nor have his refusal to testify used against him, but that a defendant who pleaded guilty would be required to admit his guilt in the course of the plea proceeding. J.A. 16-17. The court explained in addition that a defendant who pleaded not guilty would be presumed innocent unless and until his guilt was proved beyond a reasonable doubt, and would have the right to subpoena witnesses and compel their testimony at trial. J.A. 17-18. Respondent confirmed that he understood each of the rights that he would surrender by entering a guilty plea. See J.A. 15-19.

The trial court next addressed the defendants individually about the particular offense with which each was charged. The court informed respondent (and one other defendant charged with the same offense) that an OWI conviction "carries a maximum penalty of up to a year in jail and up to a $1,000.00 fine and the mandatory minimum fine [sic] of two days in jail and a $500.00 fine." J.A. 20. Respondent stated that he understood those penalties. *Ibid.*

The trial court then stated that, before it could accept a guilty plea, it needed "to be satisfied that you are in fact guilty of the offense you are pleading guilty to," and that it intended to assure itself of the defendants' guilt by "explain[ing] to you what the elements are and determin[ing] whether or not you committed those elements." J.A. 21-22. The court informed respondent that the OWI charge

> just has two elements to the offense. The first element is that on the date listed on the trial information you were operating a motor vehicle in the State of Iowa. The second element of the offense is that when you did so,

you were intoxicated. Now, under the law of the State of Iowa, there are two definitions of intoxication and you may fit one or both of those definitions. One way to be intoxicated is to have had a blood or breath alcohol concentration of .10 percent or more in your body at the time you were driving. The other way to be intoxicated is to be under the influence of alcohol, which means that the consumption of alcohol has affected your judgment [or] your reasoning or your faculties or it has caused you to lose control in any manner or to any degree of the actions or motions of your body.

J.A. 23. Respondent confirmed that on November 2, 1996, he had operated a motor vehicle in Ames, Iowa, after consuming alcohol. J.A. 23-24. Respondent stated that he had not felt any effects of the alcohol on the night in question, but that he did not dispute the results of an intoxilyzer test administered that night, which showed his blood alcohol level to be .194. J.A. 24. Respondent thereafter confirmed that he wished to enter a plea of guilty. J.A. 27-28.

The trial court accepted respondent's guilty plea, finding that the plea had been entered voluntarily and with a full understanding of respondent's rights and of the consequences of the plea. J.A. 28. The court further found that there was a factual basis for the plea. *Ibid.*

On December 30, 1996, respondent was sentenced on the OWI conviction. At the same proceeding, respondent pleaded guilty to a subsequent charge of driving with a suspended license. See J.A. 45-51. In the course of the plea colloquy on the driving-under-suspension charge, the trial court noted that respondent had applied for a court-appointed attorney, but that appointed counsel had been denied because respondent was dependent on his parents. J.A. 46. Respondent chose to represent himself at the proceedings. *Ibid.* On the OWI conviction to which respondent had previously pleaded guilty, the court imposed the

mandatory minimum sentence of two days in jail and a $500 fine. J.A. 54.[1]

2. On December 14, 2000, respondent was charged with OWI, third offense, a class D felony under Iowa law. Pet. App. 2. The enhancement of the OWI charge to a class D felony was based on respondent's 1996 OWI conviction and a second OWI conviction entered in 1998. *Ibid.*; *id.* at 24 n.1.[2] Respondent contended that his 1996 conviction could not be used to enhance the current charge because he had not knowingly and intelligently waived his right to counsel at the 1996 plea hearing. *Id.* at 2-3. The trial court rejected that contention. *Id.* at 35-37. Respondent waived his right to a jury trial and was found guilty by the court of the OWI third offense. *Id.* at 33-34. He was subsequently sentenced to a 180-day jail term, with all but 30 days suspended, and to three years of probation and a $2500 fine plus surcharges. J.A. 70-73.

The Court of Appeals of Iowa affirmed. Pet. App. 23-30. The court found that respondent had "validly waived his right to counsel prior to entry of the 1996 uncounseled guilty plea." *Id.* at 29-30. The court explained that respondent "was advised of his right to counsel and made sufficiently aware of what counsel could do for him at trial," and that he "was informed of the ultimate adverse consequences he could suffer as he was advised of the maximum possible penalties for the offense." *Id.* at 30.

3. The Supreme Court of Iowa reversed by a 4-3 vote. Pet. App. 1-22. The court acknowledged that "because the dangers of proceeding pro se at a guilty plea proceeding will

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[1] The court imposed the minimum $250 fine on the driving-under-suspension charge. J.A. 54.

[2] Petitioner pleaded guilty to the 1998 OWI offense, Pet. App. 24 n.1, and he has not challenged the validity of that plea in the current proceedings.

be different than the dangers of proceeding pro se at a jury trial, the inquiries made at these proceedings will also be different." *Id.* at 13. The court nevertheless held that the colloquy preceding respondent's 1996 guilty plea had been constitutionally inadequate. The court stated that "[a]lthough a layperson can readily understand what it means to drive while intoxicated, he or she will most likely be unaware of the prerequisites for invoking implied consent and the other statutory and constitutional restrictions on police action that might provide a basis for suppression of the evidence of intoxication, which is usually the only meaningful defense available." *Id.* at 15.

The Iowa Supreme Court accordingly concluded that for a defendant to plead guilty without counsel, the court must advise the defendant of the advantages of having counsel and of the risks of proceeding pro se. While the trial court should not attempt to perform the role of counsel, the Iowa Supreme Court held, the trial court must generally inform the defendant that laypersons may not know of defenses to criminal charges and that the danger in pleading guilty without counsel is that "a viable defense [may] be overlooked." Pet. App. 18. The Iowa Supreme Court further held that the trial court must admonish the defendant that "by waiving his right to an attorney he will lose the opportunity to obtain an independent [legal] opinion" on the wisdom of pleading guilty. *Ibid.* Finally, the Iowa Supreme Court held, the judge must tell the defendant about the "nature of the charges" and the "range of allowable punishments," so that the defendant can make an intelligent decision on whether to forgo counsel. *Ibid.*

Applying that test, the Iowa Supreme Court concluded that the record was insufficient to support a finding that respondent had knowingly and intelligently waived his right to counsel. Pet. App. 18-19. There was no showing, the court stated, that the trial judge had advised respondent of

the dangers and disadvantages of proceeding without counsel. *Ibid.* The Iowa Supreme Court therefore concluded that respondent's 1996 OWI conviction could not be used to enhance his current charge to a third-offense OWI. *Id.* at 19.

Justice Carter, joined by two other members of the court, dissented. Pet. App. 19-22. The dissenting justices explained that respondent was advised at the 1996 plea colloquy of the rights he would surrender by pleading guilty, and of the maximum and minimum sentences to which he would be subject. *Id.* at 21. They concluded that respondent "was therefore made fully aware of the penal consequences that might befall him if he went forward without counsel and pleaded guilty." *Ibid.* The dissenting justices viewed the majority's "speculation concerning unidentified potential defenses that an able lawyer might have advanced" as an inadequate basis for "ignor[ing] the consequences of a voluntary guilty plea." *Ibid.*

SUMMARY OF ARGUMENT

In order for a defendant pleading guilty to make a valid waiver of his Sixth Amendment right to counsel, the defendant must be sufficiently informed about the consequences of his actions and the nature of his rights. Through the 1996 plea colloquy, respondent received sufficient information in both categories so as to enable him to make an informed choice between his alternatives.

A. At respondent's 1996 arraignment for a first-offense OWI, the trial court made clear that a guilty plea, if accepted, would result in conviction of the charged offense without a trial of any kind. The trial court further informed respondent of the statutory minimum and maximum sentences applicable to the charge to which the plea was entered. Respondent was thereby provided constitutionally sufficient information about the consequences of the course

of action—representing himself at the arraignment and entering a plea of guilty—that he proposed to take.

Different and more extensive warnings may be required when a criminal defendant proposes to plead not guilty and then to act as his own attorney at trial. Cf. *Faretta* v. *California*, 422 U.S. 806 (1975). An individual who is unfamiliar with criminal trial procedure may need more information about the risks he faces and the consequences of self-representation to ensure that his decision to represent himself reflects a knowing and intelligent waiver of the right to counsel. But when a defendant enters a plea of guilty, he is told about the trial rights he is surrendering and is informed that, upon acceptance of his plea, he will be convicted without a formal trial proceeding and subjected to punishment within a defined statutory range. There is no basis for heightened concern that a defendant who receives that information does not adequately comprehend the likely consequences of his proposed course of action. And there are often sound reasons for a defendant to forgo an attorney and enter a prompt plea, particularly to an uncomplicated misdemeanor offense with limited and frequently predictable penalties.

B. The Supreme Court of Iowa erred in holding that respondent received constitutionally insufficient information about the assistance that an attorney could provide in pursuing a possible alternative strategy to entry of a guilty plea. Advice about the likely benefits of contesting a criminal charge, when a defendant wishes to plead guilty, is inherently speculative—and so too is advice about the likely benefits of counsel at a hypothetical proceeding contesting guilt or the prosecution's evidence. Such advice is not necessary to a valid waiver of counsel. Indeed, a guilty plea may be valid even though the defendant acts on the basis of incomplete or even inaccurate information concerning the consequences of proceeding to trial. Here, the trial court

informed respondent of the constitutional protections to which he would be entitled if he pleaded not guilty, and of the services that an attorney could provide at trial. The plea colloquy thus gave respondent constitutionally sufficient information about the available alternatives to his intended course of action.

The Supreme Court of Iowa held that the trial court was required to inform respondent that an attorney might be aware of legal defenses that are unknown to the layperson, in order to ensure respondent's awareness of the "dangers and disadvantages of self-representation." But in the context of post-indictment questioning of defendants, this Court has held that the government need only alert the defendant to the "ultimate adverse consequence" that waiver of the right to counsel may entail—namely, the potential use against him in criminal proceedings of any statements that he might choose to make. *Patterson* v. *Illinois*, 487 U.S. 285, 293 (1988). Similarly here, respondent was sufficiently informed of the "dangers and disadvantages of self-representation" at the plea hearing in this case, where he was told that a plea of guilty would result in a conviction without trial and the imposition of sentence within a specified range.

C. Affirmance of the Iowa Supreme Court's decision could have significant adverse practical consequences. Every expansion of the required guilty plea colloquy beyond the information that is truly fundamental to the defendant's choice of plea will make the colloquy less concise and thus less accessible to the defendant. The warning required by the Iowa Supreme Court, moreover, may be misconstrued by some defendants as a veiled suggestion that a meritorious defense exists in a particular case, thus creating an artificial disincentive to the expeditious resolution of the underlying prosecution. The disruptive effects of additions to the required plea colloquy will be particularly great if (as the Supreme Court of Iowa concluded) a trial court's omission of

the newly-mandated warnings exposes the defendant's prior conviction to collateral attack in a subsequent recidivist prosecution. The Constitution does not require those disruptive effects.

ARGUMENT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." To determine whether a criminal defendant's Sixth Amendment rights were violated when he was unrepresented by counsel during a particular phase of the investigative or prosecutorial process, two distinct questions must be answered: (1) whether the individual is entitled to the assistance of counsel at a given stage of the proceedings, and (2) if so, whether the individual made a voluntary and intelligent waiver of that right. This Court has taken a "pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized." *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988).

Respondent was entitled under the Sixth Amendment to the assistance of counsel in his 1996 OWI misdemeanor prosecution because it culminated in a two-day sentence of imprisonment. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972) ("[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."). It is also clear that respondent's Sixth Amendment right extended to the hearing at which his guilty plea was made and accepted by the court. See *id.* at

34. The sole question before this Court is whether respondent's express waiver of his right to the assistance of counsel was voluntary and intelligent.[3]

The information provided to respondent at his 1996 arraignment falls into two distinct categories. Certain items (the minimum and maximum punishments for the OWI offense, and the fact that there would be no trial if respondent pleaded guilty) clarified the legal consequences that would ensue if respondent adhered to his stated intention of representing himself at the arraignment and entering a guilty plea. Other aspects of the plea colloquy (the enumeration of constitutional protections) informed respondent of his trial rights if he chose to plead not guilty. Together, that information, which parallels the information required in the plea colloquy for a federal defendant under Federal Rule of Criminal Procedure 11, provided respondent with the necessary considerations to choose intelligently between the available alternatives.

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[3] An indigent defendant charged with a misdemeanor has no constitutional right to appointed counsel if no sentence of imprisonment is actually imposed. See *Scott* v. *Illinois*, 440 U.S. 367, 373-374 (1979). Under *Scott*, a constitutionally defective waiver of the right to counsel in a misdemeanor prosecution provides a basis for vacating any term of imprisonment, but it should afford no ground for disturbing the underlying conviction. See, *e.g.*, *United States* v. *Ortega*, 94 F.3d 764, 769 (2d Cir. 1996) ("The appropriate remedy for a *Scott* violation * * * is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself."). That being the case, the Constitution should not preclude the use of an uncounseled misdemeanor conviction to enhance the penalties for a subsequent offense, regardless of the validity of the prior waiver. That question is not at issue in this Court, however, because the State has not challenged the Iowa Supreme Court's determination (see Pet. App. 19) that, if respondent's waiver of counsel at the 1996 plea colloquy was invalid, the 1996 conviction cannot be used to enhance respondent's current charge to a third-offense OWI.

A. The Plea Colloquy In The 1996 OWI Prosecution Gave Respondent Complete And Accurate Information About The Manner In Which The Case Would Be Resolved If He Pleaded Guilty

1. Respondent was informed that, if he pleaded guilty, he would be convicted without trial and sentenced within a specified range

At the 1996 plea hearing, respondent was fully and precisely informed of the manner in which the OWI prosecution would be resolved if he entered a plea of guilty. The trial court informed the five defendants who appeared at the plea hearing that "if you plead guilty, you give up your right to have a trial of any kind on your charge," and respondent confirmed that he understood that consequence of the plea. J.A. 15. Respondent also confirmed his understanding of the trial court's admonition that "if you plead guilty, you give up th[e] presumption that you are innocent and by the admissions that you make in court today, you will be proving your guilt beyond a reasonable doubt." J.A. 17. The trial court further informed respondent of the minimum and maximum sentences for the first OWI offense, and respondent stated that he understood the applicable sentencing range. J.A. 20. After verifying the factual basis for respondent's plea, see J.A. 23-24, the trial court asked respondent whether he still wished to plead guilty, and respondent confirmed that he did, J.A. 27-28.

Thus, at the time his plea was entered and accepted by the trial court, respondent clearly understood that if he pleaded guilty to the 1996 OWI charge, a judgment of conviction would be entered without further inquiry and the court would sentence him within the statutory range. Indeed, the Iowa Supreme Court did not suggest that respondent was or reasonably could have been in any way surprised by the

ultimate disposition of the 1996 OWI prosecution.[4] And while the manner in which the case would be resolved was presented in the colloquy as a consequence of the guilty plea, rather than as a consequence of respondent's waiver of the right to counsel, there is, in this context, no meaningful distinction between the two. The results of entering an unconditional guilty plea to a criminal charge are precisely the same whether or not the defendant is represented by an attorney. In either event, a judgment of conviction is entered and the defendant is subject to punishment within the range allowed by law. So long as respondent was adequately informed of the consequences of his guilty plea, his decision to appear at the arraignment without counsel had no additional legal or practical effect beyond that of the plea itself. The plea colloquy therefore sufficiently informed him about the consequences of what was, in every practical respect, a single, indivisible course of action.

The consequences that would follow from respondent's plea were indeterminate only to the extent that the trial court retained discretion to impose any sentence within the statutory range. See J.A. 21 (trial court advises defendants before final entry of their pleas that "no matter what you ask for at the time of sentence and no matter what the State recommends, your sentencing is up to me and I can impose any penalty from the mandatory minimum on up to the maximum sentence"). But so long as respondent was correctly informed of the statutory minimum and maximum sentences, his lack of certainty about the precise sentence

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[4] Respondent was clearly informed at the 1996 plea hearing that a plea of guilty would result in a conviction without trial. Respondent was not specifically informed that his conviction might be used to enhance the applicable penalties for any subsequent offense. This Court has made clear, however, that the Constitution does not require the provision of such a warning, which "would merely tell [the defendant] what he must surely already know." *Nichols* v. *United States*, 511 U.S. 738, 748 (1994).

that would actually be imposed did not prevent him from entering a knowing and intelligent guilty plea.[5] In the 1996 OWI prosecution, moreover, respondent received the statutory minimum sentence (see J.A. 54), so his decision to plead guilty could not have been influenced by the hope or expectation of receiving a sentence less severe than the one that was ultimately imposed.

A defendant's waiver of counsel in entering a guilty plea does not forfeit his right to seek the assistance of counsel in connection with sentencing. See *Mempa* v. *Rhay*, 389 U.S. 128 (1967) (Sixth Amendment right to counsel applies at sentencing); cf. *Carter* v. *Illinois*, 329 U.S. 173, 178-179 (1946) (finding valid waiver of counsel at guilt stage while noting that trial judge appointed counsel at sentencing). But respondent's sole challenge here is to the waiver of counsel in connection with the entry of his guilty plea. Respondent does not challenge his uncounseled sentencing in the 1996 prosecution (in which he received, in any event, the minimum sentence allowed by law).

2. Self-representation in pleading guilty raises significantly different issues, and requires significantly different information, than does self-representation at trial

This Court has stated in dictum that the Constitution "impose[s] the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Patterson*, 487 U.S. at 298. In

[5] See Fed. R. Crim. P. 11(b)(1)(H) and (I) (before court may accept a plea of guilty in a federal criminal prosecution, court must inform the defendant of "any maximum possible penalty" and "any mandatory minimum penalty"); cf. Fed. R. Crim. P. 11(c)(1)(C) and (d)(2)(A) (defendant and the government may condition guilty plea upon an agreement that a specific sentence is appropriate, and defendant may withdraw his plea if the court rejects the agreement).

Faretta v. *California*, 422 U.S. 806, 835 (1975), the Court stated (also in dictum) that a defendant who expresses the desire to represent himself at trial "should be made aware of the dangers and disadvantages of self-representation" in order to ensure that his decision is knowing and intelligent. The Court also noted that the trial judge in that case "had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure." *Id.* at 835-836.[6]

A criminal defendant's decision to plead not guilty and to represent himself at trial, however, implicates quite different considerations than does the decision to enter an uncounseled guilty plea. Because the legal and practical consequences of a guilty plea do not vary depending on whether the defendant is represented by counsel at the time the plea is entered, a colloquy that adequately informs an uncounseled defendant of the consequences of the plea will also provide constitutionally adequate information about the consequences of waiving the right to counsel. See p. 13, *supra*. There is, by contrast, a substantial legal and practical differ-

[6] Neither *Faretta* nor *Patterson* identifies specific information or advice that must be provided to a criminal defendant who states his intent to plead not guilty and to represent himself at trial. No specific colloquy should be required in all such cases. See *United States* v. *Hill*, 252 F.3d 919, 928 (7th Cir. 2001) ("[T]he question is not whether the district judge used a checkoff list but whether the defendant understood his options."), cert. denied, 536 U.S. 962 (2002). The trial court's ultimate duty is to ensure that the defendant's decision is voluntary, knowing, and intelligent —that in choosing self-representation the defendant "knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835 (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). In some cases (as where the defendant has participated or even represented himself in prior criminal trials), the requisite understanding of what self-representation entails may reliably be inferred even without an elaborate on-the-record colloquy.

ence between contesting a criminal charge with the assistance of counsel, and contesting the charge by acting as one's own attorney. And nothing in the standard colloquy that precedes a not guilty plea is likely to clarify the distinct consequences of choosing the latter alternative.

Even after a defendant has entered an informed not guilty plea, he may have little understanding of the specific responsibilities—*e.g.*, voir dire of potential jurors, cross-examination of witnesses, introduction of documentary or physical evidence, preservation of objections to adverse trial-court rulings—that self-representation at trial entails. Indeed, a defendant might in some instances be misled by the relative informality of the plea proceeding to believe that a subsequent trial would present a fairly straightforward opportunity for him to "tell his story." A probing colloquy specifically directed at the consequences of self-representation may be necessary to ensure that a defendant who pleads not guilty and proposes to represent himself at trial has a constitutionally sufficient understanding of the potential effects of such a decision. No similar uncertainty attended respondent's decision to represent himself at the 1996 arraignment and to plead guilty to the OWI offense: respondent was clearly informed at the plea colloquy that upon acceptance of his plea, he would be convicted without further inquiry into his guilt or innocence and would be subjected to punishment within a defined statutory range.

In another respect as well, a defendant's statement of intent to plead not guilty and to represent himself at trial differs significantly from a decision to enter a guilty plea. Although a criminal defendant has the constitutional right to forgo the assistance of counsel at trial, there exists a strong consensus within the legal community that self-representation at trial is rarely in the defendant's interest. See *Faretta*, 422 U.S. at 834 ("It is undeniable that in most criminal prosecutions defendants could better defend with

counsel's guidance than by their own unskilled efforts."); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (observing that "the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant"). While this Court has held that such a consensus provides no basis for overriding the considered preference of a competent and informed defendant, see *Faretta*, 422 U.S. at 834; *Martinez* v. *Court of Appeal of Cal.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment), the likelihood that self-representation will jeopardize the defendant's interests may create grounds for concern that an individual who expresses the desire to act as his own attorney does not adequately comprehend the likely consequences of such a decision. That concern may justify a searching inquiry to ensure that the defendant's choice of self-representation is knowing and intelligent.

By contrast, a criminal defendant's decision to plead guilty is neither suspect nor anomalous. The vast majority of federal criminal convictions are obtained as a result of pleas of guilty.[7] "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971). A variety of legitimate and wholly understandable

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[7] Out of 70,882 total federal criminal convictions during the 12-month period ending September 30, 2002, more than 95% were obtained through pleas either of guilty (67,856) or of nolo contendere (332). See *Judicial Business of the United States Courts, Annual Report of the Director Leonidas Ralph Mecham*, Table D-4 (2002) (available at <http://www.uscourts.gov/judbus2002/contents.html>). We are informed by the Administrative Office of the United States Courts that during fiscal years 2000-2002, approximately 3.5-4% of federal guilty pleas were entered by uncounseled defendants. The large majority of the uncounseled pleas were to misdemeanor (approximately 3% of total guilty pleas) and petty (approximately .3 to .5%) offenses, with uncounseled pleas to felony offenses accounting for approximately .1% of total federal guilty pleas.

considerations may prompt a criminal defendant to acknowledge his guilt and thereby effect a prompt resolution of the charges against him rather than put the State to its burden of proof at trial. See, *e.g.*, *Tollett* v. *Henderson*, 411 U.S. 258, 263-264 (1973).

There are also good reasons that a defendant may choose to plead guilty without first soliciting the advice of counsel, particularly when the charged offense is a misdemeanor whose elements are easily comprehensible by the layman, and whose penalties are limited and often predictable. Even if the defendant qualifies for appointed counsel, he may reasonably desire to resolve the charges as quickly as possible, and may conclude that consultation with an attorney would delay the process and impede his efforts to put the matter behind him. And a defendant who is financially ineligible for appointed counsel (as respondent appears to have been at the time of his 1996 guilty plea, see J.A. 46) may reasonably determine that the (perhaps remote) chance of uncovering a viable defense to a charge carrying minor penalties is not worth the cost of retaining an attorney. Thus, while a trial court must verify that a defendant's plea of guilty is knowing and intelligent before the court may accept the plea, an uncounseled defendant's stated desire to plead guilty should not, in and of itself, give rise to a suspicion that the defendant fails to appreciate the consequences of his intended course of action.[8]

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[8] Federal Rule of Criminal Procedure 11(b)(1)(D) requires every defendant pleading guilty in federal court to be advised of his right to representation by counsel "at trial and at every other stage of the proceedings." In construing essentially the same language in the version of Rule 11 before its amendment in 2002, this Court observed that "[a] defendant's right to counsel on entering a guilty plea is expressly recognized in Rule 11(c)(2)." *United States* v. *Vonn*, 535 U.S. 55, 73 n.10 (2002). (Former Rule 11(c)(2) stated that, "if the defendant is not represented by an attorney, the court must inform the defendant that he has the right to be represented by an attorney at every stage of the proceeding." See *Vonn*, 535 U.S. at 60 n.2 (internal quotation marks omited). Neither the current version of Rule 11 nor any predecessor, however, has provided for any further colloquy with an unrepresented defendant to ensure that his waiver of counsel is voluntary, knowing, and intelligent.

The Court in *Vonn* did comment that an unrepresented defendant is required to object to a Rule 11 error, on pain of having appellate review be confined to the strictures of the plain-error rule, because "when a defendant chooses self-representation after a warning from the court of the perils this entails, see *Faretta* v. *California*, 422 U.S. 806, 835 (1975), Rule 11 silence is one of the perils he assumes." 535 U.S. at 73 n.10. But no issue was presented in *Vonn* on what colloquy was required to satisfy applicable standards, and the Court did not analyze whether waiver of counsel at a guilty plea implicated the same considerations that were discussed in *Faretta*.

B. Respondent Was Provided Constitutionally Sufficient Information About The Available Alternatives To Entering A Plea Of Guilty

The Supreme Court of Iowa did not suggest that respondent received insufficient information about the consequences that would follow from his chosen course of action—appearing pro se at the arraignment and entering a guilty plea. The court held, however, that the plea colloquy in this case was deficient because the trial court did not adequately advise respondent concerning the assistance that an attorney could provide in exploring possible alternative strategies. That holding is erroneous.

1. A defendant's attempt to predict the course and outcome of a hypothetical trial is inherently speculative

Although a constitutionally valid guilty plea requires that the defendant possess basic information about certain rights that he would possess at trial, the defendant need not be given a precise and detailed description of how his case would unfold if he chose to contest the criminal charges.

Any such requirement would be unworkable. A guilty plea is intended to ensure prompt and relatively certain disposition of a criminal prosecution. If the trial court accepts the defendant's guilty plea, no trial occurs and a judgment of conviction follows automatically: the only uncertainty typically involves the specific sentence that the court will select within the range authorized by law. By contrast, it is inherently more difficult to predict the course and outcome of the criminal trial that will occur if the defendant pleads not guilty. That is so both in the sense that a range of ultimate bottom-line dispositions (from conviction of the charged offense, to conviction of a lesser-included offense, to acquittal) is possible, and in the sense that a variety of subsidiary uncertainties (*e.g.*, who will sit on the jury, what witnesses will be called and how they will testify, what rulings of law the trial judge will issue, etc.) will inevitably exist at the time the plea is entered.

As this Court recently observed,

> the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

United States v. *Ruiz*, 536 U.S. 622, 629-630 (2002). Indeed, a plea of guilty may be knowing and intelligent even when the defendant receives *inaccurate* information about the consequences of proceeding to trial. In *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970), for example, the Court

held that the defendant's guilty plea was intelligently made despite his reasonable but mistaken belief, at the time the plea was entered, that if tried and convicted he would be subject to a possible sentence of death. The Court observed that the considerations relevant to a defendant's choice of plea "frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time." *Ibid.* It held that "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Id.* at 757; see *Ruiz*, 536 U.S. at 630 (The Constitution "permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.").

2. Respondent received adequate information about the services an attorney could provide

The advice given in this case adequately apprised respondent of the role that counsel could play. At the 1996 plea hearing, the trial court advised respondent concerning the various functions that an attorney could perform at trial if respondent chose to plead not guilty. See J.A. 16 (explaining that an "attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf"). The Supreme Court of Iowa found the trial court's explanation of counsel's potential role to be inadequate because the trial court did not describe the contributions an attorney could make at the plea hearing itself. See Pet. App. 18 ("The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether,

under the facts and applicable law, it is wise to plead guilty."). More specifically, the Supreme Court of Iowa held that, when an uncounseled defendant expresses an intent to plead guilty, the trial judge should "advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked." *Ibid.* The trial court's failure to convey the admonitions identified by the Supreme Court of Iowa does not render respondent's guilty plea invalid.

a. In *Patterson*, this Court held that, where a suspect had been given *Miranda* warnings before custodial interrogation, see *Miranda* v. *Arizona*, 384 U.S. 436 (1966), his subsequent waiver of his Sixth Amendment right to counsel during post-indictment questioning was knowing and intelligent. 487 U.S. at 292-300. The defendant in *Patterson* was informed "that he had a right to remain silent; that anything he might say could be used against him; that he had a right to consult with an attorney; that he had a right to have an attorney present during interrogation; and that, as an indigent, the State would provide him with a lawyer if he so desired." *Id.* at 288 n.1. This Court held that the *Miranda* warnings, although specifically designed to protect Fifth Amendment rights implicated by custodial questioning,

> also served to make [Patterson] aware of the consequences of a decision by him to waive his Sixth Amendment rights during postindictment questioning. [Patterson] knew that any statement that he made could be used against him in subsequent criminal proceedings. This is the ultimate adverse consequence [Patterson] could have suffered by virtue of his choice to make uncounseled admissions to the authorities. This warning also sufficed * * * to let [Patterson] know what a lawyer could "do for him" during the postindictment questioning: namely, advise [Patterson] to refrain from making any such statements. By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, [Patterson] was essentially informed of the possible consequences of going without counsel during questioning. If [Patterson] nonetheless lacked "a full and complete appreciation of all of the consequences flowing" from his waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum.

Id. at 293-294 (footnote omitted); see *id.* at 299-300 (*Miranda* warnings are sufficient to make the accused "aware of the 'dangers and disadvantages of self-representation' during postindictment questioning") (quoting *Faretta*, 422 U.S. at 835).

b. Respondent clearly understood that he had the right to be represented by counsel at the plea proceeding. At the outset of the hearing, the trial court stated: "Mr. Tovar appears without counsel and I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?" J.A. 8-9. Respondent replied: "Yes, sir." J.A. 9.

In *Patterson*, this Court held that the *Miranda* warnings, by informing the suspect that he had a right to have counsel present during interrogation, and that anything he said could be used against him, were sufficient "to let [Patterson] know what a lawyer could 'do for him' during the postindictment questioning: namely, advise [Patterson] to refrain from making any such statements." 487 U.S. at 294. Similarly here, respondent's awareness of his right to the assistance of counsel at the arraignment necessarily encompassed an understanding that an attorney could advise him as to the plea that he should enter. No meaningful purpose would have been served by informing respondent of the obvious

fact that, if he chose to be represented by counsel at the plea proceeding, his attorney could provide "an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty." Pet. App. 18.

c. The Iowa Supreme Court also concluded that the trial court must refer specifically to attorneys' superior ability to discern potential legal defenses in order to ensure that an uncounseled defendant understands "the dangers of self-representation." Pet. App. 18; see *id.* at 16 ("[T]here was no colloquy with [respondent] that alerted him to the dangers and disadvantages of entering a guilty plea without the advice of counsel," because "the [trial] court did not warn [respondent] that he might have legal defenses to the charge that he, as a layperson, would not recognize.").

The state court's analysis is inconsistent with this Court's decision in *Patterson*. That decision makes clear that, in order to obtain a valid waiver of a suspect's Sixth Amendment right to the assistance of counsel during post-indictment questioning, police are *not* required to inform the suspect that an attorney may be better able than the suspect himself to assess the relative advantages and disadvantages of answering particular questions. Rather, so long as the suspect is informed of "the ultimate adverse consequence" that a waiver of counsel may entail—*i.e.*, the use of his statements against him in subsequent criminal proceedings, see 487 U.S. at 293—he has adequately been "made aware of the dangers and disadvantages of self-representation," *id.* at 299-300 (internal quotation marks omitted), and his waiver of the right to counsel is knowing and intelligent. Similarly here, respondent was sufficiently informed of the "dangers and disadvantages of self-representation" at the plea hearing in this case, where he was told that a plea of guilty would result in a conviction without trial and the imposition of sentence within a specified range. See Pet. App. 30 (Iowa Court of Appeals states that respondent "was informed of

the ultimate adverse consequences he could suffer as he was advised of the maximum possible penalties for the offense.").[9]

d. The apparent implication of the Iowa Supreme Court's Sixth Amendment analysis is that a waiver of the right to counsel in the guilty-plea context will be deemed valid only if the trial court actively raises doubts about the defendant's ability to proceed intelligently without counsel, or at least suggests that consultation with counsel would be the wiser option. As *Patterson* makes clear, however, a criminal defendant who seeks to proceed without counsel may adequately be apprised of the "dangers and disadvantages of self-representation" without being told that self-representation is a mistake. With respect to other constitutional rights as well, the government's duty (when the government is required to provide warnings at all) is simply to convey neutral, objective information, not to *evaluate* the competing options or to identify the choice that a "reasonable" individual

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[9] In addition to informing respondent of the minimum and maximum penalties for the charged offense, and of the various constitutional protections to which he would be entitled if he chose to plead not guilty, the trial court inquired into the factual basis for respondent's plea in order "to be satisfied that you are in fact guilty of the offense you are pleading guilty to." J.A. 21-22; cf. Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."). Respondent confirmed that on November 2, 1996, he had operated a motor vehicle in Ames, Iowa, after consuming alcohol. J.A. 23-24. Although respondent stated that he had not felt any effects of the alcohol on the night in question, he did not dispute the results of an intoxilyzer test administered that night, which showed his blood alcohol level to be .194. J.A. 24. Those admissions were sufficient to establish both elements of the OWI offense. See Iowa Code Ann. § 321J.2(1) (West 1997); J.A. 23. The factual basis inquiry provided an additional safeguard against the entry and acceptance of a guilty plea made by a defendant whose conduct was not actually prohibited by the relevant criminal law. See *McCarthy* v. *United States*, 394 U.S. 459, 467 (1969).

would make. Thus, although "proceeding without counsel in custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage," *Martinez*, 528 U.S. at 165 (Scalia, J., concurring in the judgment), a suspect in that setting may validly waive his Fifth Amendment rights without receiving warnings analogous to those required by the Iowa Supreme Court in this case. Rather, "[o]ur system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State." *Ibid.*[10]

[10] The plea colloquy in this case appears to have been at least as extensive as that held constitutionally sufficient in *Carter* v. *Illinois*, 329 U.S. 173 (1946), which involved a guilty plea entered by an uncounseled defendant charged with murder. See *id.* at 174. The trial court judgment in *Carter* stated:

> And the said defendant * * * having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. Thereupon the Court fully explained to the Defendant * * * the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant * * * persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment.

Id. at 177. This Court rejected Carter's challenge to the resulting conviction, explaining that "[a] fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel." *Ibid.*

C. Affirmance Of The Iowa Supreme Court's Decision Could Significantly Complicate Both The Process By Which Guilty Pleas Are Entered And Accepted, And The Enforcement Of Recidivism Statutes

1. The guilty plea colloquy should be sufficiently concise that the defendant can understand it

This Court's "cases make absolutely clear that the choice to plead guilty must be the defendant's: it is *he* who must be informed of the consequences of his plea and what it is that he waives when he pleads, and it is on his admission that he is in fact guilty that his conviction will rest." *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring) (citation omitted); see *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (recognizing that a criminal defendant "has the ultimate authority to make certain fundamental decisions regarding the case, [including] whether to plead guilty"). In order for the colloquy that precedes a guilty plea to serve its intended purpose, it must therefore be sufficiently concise that a layperson can understand it. And that is likely to be true only if the colloquy focuses on those items of information that are *fundamental* to the defendant's choice of plea. A virtually limitless range of information about the criminal process might be regarded as (a) true and (b) conceivably relevant to a defendant's decision whether to plead guilty; but the colloquy would quickly become unmanageable if all such information were required to be conveyed to the defendant. Although no single item of additional information is likely to overwhelm the defendant, any expansion of the required colloquy beyond what is truly central to the plea decision will render the colloquy at least marginally less accessible to its lay audience. Cf. *Libretti* v. *United States*, 516 U.S. 29, 50 (1995) (declining to "expand upon the

required plea colloquy" to include advice about waiver of rule-based jury trial rights at sentencing).[11]

2. The plea colloquy should not artificially discourage defendants from pleading guilty

In explaining the responsibilities of trial courts when conducting plea colloquies with uncounseled defendants, the Supreme Court of Iowa stated that "the court is not expected to assume the role of an attorney, discussing with the defendant the various defenses that might be available. Rather, the trial judge need only advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked." Pet. App. 18. If a defendant understands that such an admonition is simply a general statement about the superior legal expertise of attorneys as a class, the warning is unlikely to tell him anything he does not already know. There exists a potential danger, however, that a defendant may misinterpret such a warning as a veiled suggestion that a meritorious defense actually exists in his own case. If that misimpression creates an artificial inducement for the defendant to consult with an attorney, even though in fact there is no viable basis for contesting the criminal charges, the prompt and efficient disposition of the case will be impeded, and the resources of either the State (if the defendant is

[11] This is not to say that the court in a plea colloquy must limit itself to those admonitions that have previously been held to be constitutionally required, or even to those that are mandated by applicable federal or state rules. Exercising its sound discretion, the trial court may supplement the colloquy required by Federal Rule of Criminal Procedure 11 or its state counterpart. See *Libretti*, 516 U.S. at 50. That such supplementation may be thought desirable in particular circumstances, however, does not make it constitutionally required.

indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.

3. Any additions to the required plea colloquy will be especially disruptive if they give rise to collateral attacks on prior convictions

The disruptive effects of indiscriminate additions to the required plea colloquy will be particularly great if (as the Supreme Court of Iowa concluded) omission of the newly-mandated warnings exposes the defendant's prior conviction to collateral attack in a subsequent recidivist prosecution.[12]

[12] This Court has held that a conviction obtained in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), may not be used "either to support guilt or enhance punishment for another offense." *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967). The Court subsequently concluded that, "with the sole exception of convictions obtained in violation of the right to counsel," a defendant in a federal sentencing proceeding may not collaterally attack the validity of prior state convictions used to enhance his sentence under the Armed Career Criminal Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 1801-1803, 98 Stat. 2185. *Custis* v. *United States*, 511 U.S. 485, 487 (1994); see *id.* at 490-497. The Court explained, *inter alia*, that "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order," while resolution of other constitutional challenges to a prior conviction could "require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." *Id.* at 496.

It is not altogether clear how *Burgett* and *Custis* apply to a defendant's claim, in a recidivist prosecution or sentencing, that his prior conviction was invalid because his waiver of the right to counsel was not knowing and intelligent. On the one hand, failure to obtain a valid waiver might plausibly be regarded as the constitutional equivalent of a failure to provide counsel at all, bringing the case within the rule announced in *Burgett*. On the other hand, to permit collateral attacks on the validity of prior waivers of counsel will "require sentencing courts to rummage through" records of earlier plea colloquies, and thus will pose precisely the difficulties of administration that the Court in *Custis* sought to avoid. The question is not directly presented in this case, however, since the State

Cf. *United States* v. *Akins*, 276 F.3d 1141, 1145 (9th Cir. 2002) (explaining that a defendant charged under 18 U.S.C. 922(g)(9) with possession of a firearm after a misdemeanor domestic violence conviction is authorized by statute to challenge the validity of the guilty plea through which the predicate conviction was obtained). If a particular legislative body or rules committee concludes that the admonitions identified by the Supreme Court of Iowa should be provided to all uncounseled defendants who contemplate a plea of guilty, it is free to impose that requirement for future plea colloquies within the relevant jurisdiction. If this Court holds that such warnings are required by the Constitution, however, its decision may call into question the use of a multitude of *prior* convictions in current and future recidivist prosecutions. For the reasons discussed above, such a holding is not required by the Constitution.

CONCLUSION

The judgment of the Supreme Court of Iowa should be reversed.

Respectfully submitted.

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has not challenged the determination of the Supreme Court of Iowa that respondent's 1996 conviction may be collaterally attacked in the current recidivist prosecution. See also note 3, *supra*.

Supreme Court, U.S.
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(10)

No. 02-1541

In the
Supreme Court of the United States

STATE OF IOWA

Petitioner

v.

FELIPE EDGARDO TOVAR

Respondent

On Writ of Certiorari
To The Supreme Court of Iowa

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

May the Iowa Supreme Court assure a voluntary and intelligent waiver of counsel by requiring the judge to advise one who pleads guilty that he has a right to be represented by counsel in making that decision, that there is a risk that in waiving counsel a viable defense may be overlooked and that by waiving an attorney, he will lose the opportunity for an independent opinion on whether it is wise to plead guilty?

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of respondent Felipe Tovar's assertion of rights under the Sixth and Fourteenth Amendments. Both petitioner and respondent have granted amicus consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICUS CURIAE

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice. NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. In this case, the NACDL is concerned about the failure to warn a defendant pleading guilty about his right to and the value of assistance of counsel in pleading guilty.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. See Rule 37.6. The petitioner and respondent have consented to the filing of this brief, and amicus has filed the letters of consent with the Clerk of the Court, pursuant to Rule 37.3(a).

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Respondent's brief.

SUMMARY OF ARGUMENT

Legal counsel is invaluable to one considering pleading guilty to a crime. A competent attorney will investigate both the facts and the law and consider a wide range of complex issues bearing on legal guilt, punishment and collateral consequences. Since a defendant cannot knowingly waive the benefit of advice he does not know he needs, a judge should advise defendants not only of their right to counsel in considering a guilty plea but also the advantages of counsel in that process. The warnings required by the Iowa Supreme Court provide a clear and sensible solution.

Under Patterson v. Illinois, 487 U.S. 285 (1988) the scope and content of the warnings required for a valid waiver of the right to counsel vary with the stage of the proceedings and the likely impact of counsel's participation in that stage. The guilty plea stage is at the higher end of the scale of relative importance of counsel, second only to counsel at the trial stage, where extensive warnings are required per Faretta v. California, 422 U.S. 806, 835 (1976).

The plea decision will often appear deceptively simple to a defendant unaware of possible suppression issues, unaware of defenses, unaware of the vast array of possible collateral deprivations and punishments inherent in the seemingly insubstantial criminal charge. There are a multitude of considerations relevant to deciding whether it is in the defendant's interests to plead guilty. They include not only a range of issues surrounding the alternative of trial, but a starkly different range of issues surrounding the guilty plea. Most laymen cannot begin to comprehend the multitude of

considerations which only a competent attorney can be expected to know and assess. If the defendant has no lawyer, and he discusses the pros and cons of pleading guilty with any attorney, it is likely to be with his adversary, the prosecutor. Even a scrupulously fair prosecutor is no substitute for defense counsel.

A plea colloquy is no proxy for a warning about the right to and value of counsel in plea-bargaining and in deciding whether to plead guilty. The purpose of the plea colloquy is to assure that a plea is voluntary; it is not to assure that the plea is in the defendant's best interests. The role of defense counsel is far broader. Defense counsel's job is to assure that the decision to plead guilty, if made, is desirable from the defendant's perspective. To give advice on the desirability of a plea, defense counsel needs to know an array of factual and legal considerations and possible consequences unrelated to the subject matter of the plea colloquy. Collateral consequences, for example, are not even alluded to in the plea colloquy yet they are a central concern in a great many guilty plea decisions, especially those involving driving under the influence of alcohol, which can carry with them loss of drivers' licenses, civil liability for damages, disqualification for employment or professional licensing, and can elevate subsequent convictions to felonies. A first time offender is very unlikely to be aware of these risks in pleading guilty. Only his attorney is likely to inform him of them. A defendant who lacks such advice cannot make an informed decision about the desirability of pleading guilty.

Adding a few sentences of explanation of the value of an attorney to the other warnings required for a valid guilty plea imposes no significant new burdens on the system and works to assure that a knowing, intelligent waiver of counsel is made and a valid guilty plea entered. The defendant still bears the burden of proving that his waiver was not knowing or valid. The decision below does not alter traditional burdens of proof an iota.

Nor does the decision below preclude a state from attaching significance in later proceedings to convictions obtained by guilty pleas lacking effective waivers of counsel. It was stipulated by the parties below that Iowa did not attempt to -- and could not have had it wanted to -- convert a misdemeanor into a felony by relying on an invalid prior OWI conviction. Whether if a state chose to rely in some way on a conviction subject to collateral attack for ineffective waiver of counsel it could do so is plainly not before this Court, is not argued by either of the parties and should not be opined upon.

ARGUMENT

I. THE IOWA WARNINGS OR WARNINGS AT LEAST AS EFFECTIVE ARE REQUIRED UNDER THE SIXTH AMENDMENT FOR A KNOWING WAIVER OF THE RIGHT TO COUNSEL AT THE PLEA STAGE

The value of legal counsel when deciding whether to plead guilty is both great and easily overlooked by a layman. Before advising a guilty plea, a competent attorney will consider not just the facts but also a wide range of complex (and often counterintuitive) legal issues bearing on legal guilt and punishment: suppression, defenses, mens rea, likely sentencing outcomes, and future collateral consequences. Because a defendant cannot knowingly waive the benefit of advice he does not know he needs, requiring trial judges to advise defendants of the usefulness of counsel before accepting a guilty plea is fully consistent with the Sixth Amendment. The warnings imposed by the Iowa Supreme Court constitute a clear and sensible bright line rule, and should be adopted as the minimum standard for waiver of the right to counsel at the guilty plea stage under the Sixth Amendment.

A. A Knowing Waiver of the Right to Counsel at the Plea Stage Requires Specific Warnings Because Laypeople Do Not Realize that the Decision to Plead Guilty Involves Complex Legal Judgments

The purpose of the Sixth Amendment right to counsel is "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 465 (1938). Any waiver of counsel during criminal proceedings must be knowingly and intelligently made, with "sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 238, 242 (1970). To ensure that the waiver is knowing, the Sixth Amendment requires that a defendant be warned of the perils of proceeding without counsel at certain key phases of the proceedings. See, e.g., Faretta v. California, 422 U.S. 806, 835 (1976) (waiver of counsel at trial).

In Patterson v. Illinois, 487 U.S. 285 (1988), the Court noted that the scope and specificity of the required warning depends on the likely impact of counsel's presence at the particular stage of the proceedings, and on the ability of a lay defendant to assess this impact on his own. Id. at 298-300. Thus, the simple *Miranda* warning is sufficient for a waiver of counsel at postindictment questioning because the attorney's role at questioning is relatively limited and the advantages of counsel obvious to the accused; yet extensive warnings are required before a defendant is permitted to proceed to trial without benefit of counsel. Id. at 299-300; Faretta, 422 U.S. at 806 (defendant must be informed of the "dangers and disadvantages of self-representation").

Waiver of counsel at the guilty plea stage is at the rigorous end of the spectrum of waiver requirements established in Patterson. An attorney plays a vital role at the plea stage by advising his client about whether it is in his interests to plead guilty. Moreover, the usefulness of counsel at the plea stage is far from obvious without specific

warnings. The types of assistance an attorney can provide, such as pointing out potential technical or legal defenses and suppression issues or informing the defendant of unexpected sentencing and collateral consequences of pleading guilty, are, by their very nature, likely to be unknown to a lay defendant.

Perhaps the most complex and difficult task a defense attorney performs is to assess his client's chances of winning at trial and to advise him about whether to plead guilty. As this Court has recognized, "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." Brady v. United States, 397 U.S. 742, 748 n.6 (1970); see also Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) ("A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial.").

The plea decision appears deceptively simple. In most cases, however, it involves, or should involve, several judgments requiring legal expertise. What defenses are potentially available? What evidence might be subject to suppression? What mental state is required and how will the state prove it? How are the witnesses and circumstances of the case likely to be viewed by a jury? What is the likely sentence under any applicable guidelines, and is that sentence low enough to justify forgoing the defendant's right to trial? What are the collateral consequences of conviction? These are all questions that any competent lawyer will have thought about and researched before advising a defendant to plead guilty. Yet these questions, to say nothing of the answers, are not obvious to the layperson. If unrepresented by counsel, the only lawyer the accused is likely to consult is his adversary, the prosecutor. However fairminded, the prosecutor is no substitute for defense counsel.

In addition to weighing and considering an array of legal and factual issues, a defense lawyer can often eliminate by negotiation many risks and uncertainties otherwise facing

the accused. In exchange for a guilty plea, defense counsel routinely obtain sentence and charge concessions from the prosecutor that would rarely even occur to the uncounseled accused.

To suggest just a few situations where the absence of counsel would likely have a decisive impact, consider the following hypothetical cases: The defendant pleads guilty to driving while intoxicated without realizing that the results of his breathalyzer test are suppressible. An innocent defendant pleads guilty without realizing that he has an entrapment defense, a duress defense, or that his intoxication negates the specific intent required by the crime.[2] The defendant pleads guilty to what he thinks is a nonserious theft without realizing that the consideration of his relevant conduct, including uncharged or acquitted conduct, will likely lead to a sentence at the high end of the statutory range. The defendant pleads guilty to a minor felony to resolve the case quickly and get on with his life without realizing that the conviction will lead to his deportation. An attorney's role at the guilty plea stage is vital and extensive.

Absent specific warnings, the dangers of pleading guilty without counsel are not obvious. A defendant who believes himself guilty of the charges and is aware of the range of potential sentences may be under the false impression that there is nothing an attorney can do for him. This danger is all the more pressing in OWI cases such as this one, where the charges seem simple and straightforward.

The importance of an attorney at the plea stage sets this case apart from the postindictment questioning considered in Patterson. The dangers and disadvantages of

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[2] As one scholar has pointed out, "substantive criminal law contains many complexities--intent standards, jurisdictional provisions, defenses, and so forth. The defendant may be 'guilty' in a layman's sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime." William Stuntz, Waiving Rights in Criminal Procedure, 75 Va. L. Rev. 761, 830 (1989).

self-representation during interrogation are less substantial and more obvious to the accused than they are at the plea stage. As the Court noted, an attorney's role at questioning is "substantially different from the attorney's role in later phases of the criminal proceedings," id. at 294 n.6, and largely limited to advising his client to refrain from making statements to the police that could later be used against him. Id. at 193-94. Once the accused has received *Miranda* warnings, it should be clear to him what type of assistance an attorney can provide during questioning and that by waiving his right to counsel he is taking the risk that he may make damaging statements. A defendant pleading guilty, by contrast, may not be aware of the complex legal judgments that are required to adequately weigh the advantages and disadvantages of his decision.[3]

The State contends that a waiver of counsel is valid even if the defendant has an incomplete or faulty understanding of the services an attorney provides (Pet. Br. p.17-20). The State relies on cases in which this Court has found a guilty plea valid where a defendant had the benefit of competent counsel but was laboring under a misapprehension when he decided to plead guilty. See, e.g., United States v. Ruiz, 536 U.S. 622, 629-30 (1992) (defendant is unaware of impeachment evidence against State's witnesses); Brady v. United States, 397 U.S. 742, 757 (1970) (defendant "misapprehended the quality of the State's case"); McMann v. Richardson, 397 U.S. 759, 770 (1970) (counsel "misjudged the admissibility" of a confession). These cases simply hold that because the decision to plead guilty is often based on "difficult judgments," McMann at 769, and involves "unavoidable uncertainty," id., the Court will not invalidate a guilty plea simply because in retrospect "the good-faith evaluations of a reasonably competent attorney … turn out to be mistaken." Id. at 770. That a defendant who pleads guilty based on his counsel's best judgment at the time of the plea will be held to that decision if his counsel's advice later turns out to have been wrong has no bearing on whether a defendant may waive counsel if he misunderstands the role of counsel at the guilty plea stage. A valid waiver requires "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Patterson, 487 U.S. at 292 (citation omitted). A defendant who waives the right to trial and pleads guilty based on his attorney's assessment of his case is aware that there is a chance that he would be acquitted at trial and that he is foregoing that chance by pleading guilty. The defendant who waives counsel at the guilty plea stage without understanding what sorts of things an attorney can do for him at the plea stage does not understand the consequences of his decision to forgo the aid of counsel, and his waiver is therefore invalid.

[3] A valid plea colloquy contributes virtually nothing to the defendant's understanding of the importance of counsel at the plea stage. See below Section I.B.

B. A Plea Colloquy is No Substitute for a Warning About the Right to and the Value of Counsel

The State argues that a valid guilty plea colloquy is sufficient to ensure that a defendant's waiver of counsel is knowing and intelligent. Under Patterson, "an accused's waiver of his right to counsel is 'knowing' when he is made aware" of "the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." 487 U.S. 285, 298 (1988); see also id. at 292-93 (the "key inquiry" is whether the accused was "made sufficiently aware of his right to have counsel present" and "the possible consequences of a decision to forego the aid of counsel.").

The plea colloquy does not meet this standard. The advice given to Tovar by the judge in this case focused on the trial rights Tovar would be foregoing if he pled guilty. One of those rights was the assistance of counsel. Nowhere did

the judge tell Tovar that he had a right to a lawyer to assist him in plea-bargaining or in deciding whether to plead guilty or go to trial. Nor, of course, did he advise Tovar of the value of counsel in such a process.

The purpose of a plea colloquy such as is required by Iowa law is to assure that the decision to plead guilty is voluntary, i.e. free from impermissible coercion and made with a basic understanding of the direct consequences. The purpose of the assistance of counsel is much broader. Counsel not only helps assure that the plea is voluntary, counsel can also be of great value in negotiating a favorable plea-bargain. Counsel's assistance is essential to assure that the plea is prudent and desirable. When a defendant has counsel, counsel is obliged to investigate fully the facts and the law and to advise the defendant whether the proposed plea is desirable. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948); Boria v. Keane, 99 F. 3d 492 (2d Cir. 1996); Model Code of Professional Responsibility EC 7-7 (1992). To fulfill those obligations, defense counsel must determine the potential collateral consequences of the conviction and explain those risks to the client. The risks vary greatly with the particular conviction in question, the biographical circumstances and lifestyle of the client and a myriad of other factors. A seemingly trivial conviction may later elevate a misdemeanor to a felony, or in any event increase, perhaps double, the potential sentence on a second conviction; may be a predicate offense on a RICO charge, see 18 U.S.C. §1961-68, or a "strike" that converts a nominal prison sentence into a life sentence, see Ewing v. California, 538 U.S. 11 (2003); may result in deportation, loss of an occupational license or exclusion from a profession. The plea colloquy conducted by the judge who accepts a guilty plea says not a word about any of these collateral consequences. See generally, Wayne LaFave & Jerold Israel, Criminal Procedure 936 (2d ed. 1992) (defendant need not be warned by the court of collateral consequences). The entire subject is ignored. Only a lawyer can fully explore potential

collateral consequences and help the defendant assess the gravity of their risk. Only a defendant who is aware of those risks can determine that a guilty plea is in his best interest. The plea colloquy is no substitute for the assistance of counsel.

C. The Iowa Warnings Establish a Clear and Sensible Minimum Requirement under the Sixth Amendment

The Sixth Amendment does not mandate a particular procedure or formulation for the required warning. Cf. Miranda v. Arizona, 384 U.S. 436, 490 (1966) ("the Constitution does not require any specific code of procedures for protecting" the privilege against self-incrimination). Nevertheless, in cases discussing the *Miranda* warnings protecting Fifth Amendment rights, this Court has repeatedly emphasized the virtues of a simple and clear bright-line rule that provides "concrete constitutional guidelines" for courts to follow. Id. at 441-42; see also, Berkemer v. McCarty, 468 U.S. 420, 430 (1984) (noting that one of "the principal advantages of the [*Miranda*] doctrine … is the clarity of that rule"); Arizona v. Roberson, 486 U.S. 675, 681 (1988) (same). This specificity "benefits the accused and the State alike." Id. Accordingly, Respondent need not justify each and every word of the Iowa warnings under the Sixth Amendment so long as they establish a clear rule that adequately protects the right to counsel while pleading guilty.

The warnings required by the Iowa Supreme Court provide a simple, clear, and sensible rule that protects defendant's right to counsel and eliminates any doubt as to what judges must do to ensure a valid waiver. The Iowa warnings require a court to advise a pro se defendant wishing to plead guilty (1) of the usefulness of an attorney; (2) that there are defenses to criminal charges that may not be known by laypersons and that without an attorney the defendant may overlook a viable defense; and (3) that an attorney may

provide an independent opinion as to whether, under the facts and applicable law, it is wise to plead guilty. State v. Tovar, 656 N.W.2d 112, 121 (2003). These warnings directly apply Patterson's requirement that a defendant understand the usefulness of counsel at the particular proceeding and the dangers of self-representation to the guilty plea procedure. Without making the judge assume the role of attorney and discuss the specific issues raised in the defendant's case, the Iowa warnings succinctly convey to the defendant that legal guilt is not necessarily the same as factual guilt in the layperson's sense, and that there is a body of technical legal rules inaccessible to a layperson that may alter the complexion of even the most superficially simple case. A defendant who proceeds to waive counsel after hearing the Iowa warnings does so "with his eyes open," Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942), and is aware that he risks overlooking information that could alter his decision to plead guilty. The Court should therefore find that the Iowa warnings constitute the minimum required under the Sixth Amendment to establish a knowing waiver of counsel while pleading guilty.[4]

II. THE DECISION OF THE COURT BELOW IMPOSES NO HEAVY BURDEN ON THE PROSECUTION

As Petitioner must concede, a valid guilty plea in Iowa requires a rather elaborate plea colloquy. Without the

[4] A finding that the Iowa warnings establish the minimum required under the Sixth Amendment would not preclude states from using other procedures to protect the defendant's rights so long as they are at least as effective as the Iowa warnings. Cf. Miranda, 384 U.S. at 467 (the *Miranda* warnings constitute a constitutional minimum but do not preclude Congress and the states from using other procedures to protect the rights of the accused so long as they are "at least as effective" as the *Miranda* warnings).

colloquy, there is no valid plea. All the decision below does is require that a few additional sentences be added regarding the right to and possible value of counsel. If the state does not record what is said to a defendant when a guilty plea is taken, or if it loses the records, the plea is already subject to a collateral attack for alleged deficiencies in the plea colloquy. The decision below does not create that problem for the prosecution, it is inherent in the failure to keep or the loss of court records. The decision below adds no significant new burdens and creates no new dangers of convictions being erroneously invalidated because of missing records. The specter of lost records raised by the NDAA is unwarranted.

Nor, as the NDAA claims, does the decision below reverse the burden of proof and require the prosecution to prove in every case that the requisite warnings were given (NDAA Br. 9). There is a presumption of regularity regarding any final conviction and the burden rests on any defendant collaterally attacking such a conviction to prove its invalidity. It will not suffice for a defendant to discover that the records of his plea colloquy cannot be found. He must affirmatively prove that the requisite waiver of counsel did not occur. There is nothing whatever in the decision of the court below that alters this traditional allocation of burdens. Indeed, there was a transcript of the proceedings when Tovar's 1996 guilty plea was received. The transcript clearly showed that no warning was given about the right to or value of counsel in connection with the guilty plea.[5] There was no alteration of the burden of proof. The burden was on Respondent and he clearly met that burden.

[5] Indeed, in Parke v. Raley, 506 U.S. 20 (1993), the Court explicitly distinguished between the case before it, in which the mere absence of a transcript was insufficient to satisfy the defendant's burden on collateral attack, and "a case in which an extant transcript is suspiciously 'silent' on whether the defendant waived constitutional rights." Id. at 30.

III. WHETHER AN INVALID WAIVER NECESSARILY MAKES A GUILTY PLEA UNUSABLE FOR FUTURE ENHANCEMENTS IS NOT BEFORE THIS COURT

The amici brief of the States of Colorado, et al., argues that even if the Iowa Supreme Court was correct in holding that warnings were required for a waiver of the right to counsel and the conviction was therefore invalid, it should still be reversed for holding that the invalid conviction could not be used for enhancement (States' Br. at 16-22). That question, however, is not before this Court. The Petition made no such claim and it is not made in Petitioner's brief. Nor was it considered below. In fact, it was stipulated away. According to the Supreme Court of Iowa, the "parties agree that a prior conviction resulting from an uncounseled guilty plea for which there was an invalid waiver of counsel may not be used to enhance a subsequent offense where the prior conviction resulted in incarceration." Appendix to Petition, at 3. The court also relied in part on state law as support for that position. Id. (citing State v. Cooper, 343 N.W.2d 485, 486 (Iowa, 1984). The amici claim that a conviction based upon a guilty plea is sufficiently reliable, without benefit of counsel or a valid waiver of counsel, to be used for enhancement purposes, e.g., to convert a misdemeanor into a felony. A number of this Court's decisions hold that prior uncounseled convictions cannot be used for collateral purposes, not even to impeach a witness. Loper v. Beto, 405 U.S. 473 (1972); see also Burgett v. Texas, 389 U.S. 109 (1967). However, Lewis v. United States, 445 U.S. 55, 67 (1980), suggests that a conviction based upon a guilty plea without a valid waiver of counsel could be used as a predicate offense for a felon-in-possession offense. That case can be distinguished because the defendant stood convicted of a felony at the time he possessed the weapon. The Court construed the statute in question to apply to

anyone possessing a weapon who at the time was convicted of a felony, whether or not that felony was subject to collateral attack. The prosecution for possessing the weapon was not the appropriate forum for collaterally attacking the prior felony. The States also rely on Custis v. United States, 511 U.S. 485, 487 (1994), which held that a federal statute could validly enhance the sentence of a person who had previously been convicted of an offense if his only attack on the validity of that conviction was ineffective assistance of counsel. The Court suggested that if the defendant had not had counsel, the conviction could not be used but that if his counsel had merely been ineffective the conviction was sufficiently reliable to be used for enhancement. Custis is therefore distinguishable because here the claim is not that counsel was ineffective; rather, it is that counsel was not there because counsel was invalidly waived.

While this Court's decisions provide little support for the States' position, it would not be entirely frivolous if asserted in a case where it was an issue. One could rationally argue that a conviction based upon an uncounseled guilty plea, although invalid and subject to collateral attack, could still be used, if a State so chose, to enhance the penalty for a subsequent crime committed prior to any challenge to the earlier conviction. But there is no evidence that Iowa is interested in enhancing sentences by relying upon invalid convictions. Nor has that issue been raised or considered below or briefed by the parties. This Court should ignore it.

CONCLUSION

For the foregoing reasons, the decision of the Iowa Supreme Court should be affirmed.

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In the Supreme Court of the United States

STATE OF IOWA,
Petitioner

vs.

FELIPE EDGARDO TOVAR
Respondent.

ON WRIT OF CERTIORARI TO THE
IOWA SUPREME COURT

BRIEF OF THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE IOWA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a defendant at a plea proceeding intelligently and knowingly waives his fundamental right to counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, when the trial court fails to advise the defendant about the dangers and disadvantages of self-representation.

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INTERESTS OF *AMICI CURIAE*[1]

The NATIONAL LEGAL AID & DEFENDER ASSOCIATION (NLADA) is a private, non-profit membership organization founded in 1911 to promote the availability of quality legal services in civil and criminal cases to individuals who are unable to afford to retain private counsel. NLADA's membership spans all 50 states and the District of Columbia, situated in approximately 3,000 offices, including civil legal aid providers, public defender programs, at both the state and county level, statewide defender commissions, assigned counsel programs, contract defender programs, state and local defender associations, law school criminal clinics, and death penalty trial and post convictionprograms. NLADA provides training, technical assistance, internet information resources, standards, periodicals and other publications, and amicus curiae participation in appropriate cases affecting the rights of poor and low income peopleseeking equal access to justice.

The ILLINOIS ASSOCATION OF CRIMINAL DEFENSE LAWYERS (IACDL) is the only statewide organization for criminal defense lawyers in Illinois that represents both the public and private sectors of the criminal defense bar. It is a not-for-profit organization that retains complete independence from outside funding sources by being supported solely by its members. Its goal is to achieve justice and dignity throughout the criminal justice system by fostering, maintaining, and encouraging the integrity, independence,

[1] The parties have consented to the filing of this brief. No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. *Amici curiae* also note that one of the contributors to this brief, Emily Hughes, represented Felipe Tovar in this matter in the district court when she was an assistant public defender in Johnson County, Iowa.

and expertise of lawyers in the field of criminal defense. Its purpose is to improve the quality of representation to the citizen accused and to assist its members by providing resources via committees, continuing education seminars, and current legislative actions. By presenting views and cases before state and federal legislative bodies, and by assisting in the writing of *amici curiae* briefs, the IACDL seeks to improve the criminal justice system in Illinois.

The IOWA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (IACDL) is the only statewide organization for criminal defense lawyers in Iowa that represents both the public and private sectors of the criminal defense bar. An independent, not-for-profit organization, its goal is to achieve justice and dignity throughout the criminal justice system by fostering, maintaining, and encouraging the integrity, independence, and expertise of lawyers in the field of criminal defense. It informs members by providing resources via committees and continuing education seminars. The Iowa Association of Criminal Defense Lawyers also advocates on behalf of the improvement of the criminal justice system by presenting views and cases before state and federal legislative bodies, and by assisting in the writing of *amici curiae* briefs.

The NLADA, the Illinois Association of Criminal Defense Lawyers, the Iowa Association of Criminal Defense Lawyers, and their members have a compelling interest in the outcome of this case because this Court's decision affirming the Iowa Supreme Court will protect the fundamental right to counsel for all persons facing misdemeanor and felony offenses.

STATEMENT OF FACTS

Amici adopt the statement of facts in petitioner's brief, with the exception that *amici* take issue with any characterization in petitioner's brief or in petitioner's *amici's* briefs that

Felipe Tovar was not indigent when he pled guilty to Operating While Intoxicated in Story County, Iowa.

SUMMARY OF ARGUMENT

This Court should affirm the Iowa Supreme Court's decision because it protects the fundamental right to counsel under the Sixth Amendment to the United States Constitution. Because this Court indulges every reasonable presumption against the waiver of a fundamental right, the question of whether Felipe Tovar knowingly and intelligently waived his fundamental right to counsel must be approached with extreme caution—especially because he was never advised that he had a right to counsel in his plea hearing, much less warned of the dangers and disadvantages of proceeding without counsel.

In order to ensure that misdemeanor defendants who plead guilty are not subjected to assembly-line justice, this Court should affirm the decision of the Iowa Supreme Court so that all persons pleading guilty to a crime without the aid of counsel are made aware of the dangers and disadvantages of self-representation.

Amici offer the Court comprehensive judicial authority favoring a reading of the Sixth Amendment to militate in favor of a court providing a defendant with advice about the role of counsel in a plea proceeding and the risk of going forward without counsel before accepting a plea. The eighteen states and six federal circuits that have addressed the issue of waiver of counsel at a plea proceeding either require or strongly advise a trial court to admonish a defendant about the dangers of self-representation. Ten states which have addressed this issue in the context of plea proceedings do not

require a defendant to be warned of the dangers of self-representation. No federal circuits have taken this approach. The remaining states and federal circuits have not addressed the issue of waiver of counsel in the context of a plea proceeding, although many have addressed it in the context of trial. Clearly the best practice is to make all persons charged with misdemeanors or felonies aware of the risks of waiving counsel.

Because of the importance of ensuring that a defendant who waives counsel does so with his "eyes open," this Court should require that a defendant be fully apprised of the consequences of participating in a plea hearing without the assistance of counsel.

ARGUMENT

When Felipe Tovar pled guilty to Operating While Intoxicated in Story County, Iowa, he was twenty-one years old, J.A. at 12,[2] and had no prior criminal record. J.A. at 52-53. His plea hearing amounted to a mini "cattle call" wherein five defendants pled guilty to unrelated and different misdemeanor offenses at the same time. J.A. at 6-42.

Although the trial judge advised Tovar about his right to an attorney should he choose to go to trial, J.A. at 16, the trial judge failed to advise Tovar about his right to an attorney at

---

[2] *Amici curiae* use the following abbreviations: "Pet. Cert." refers to State's Petition for Certiorari; "Pet. App." refers to Appendix to Petition for Certiorari; "Pet. Br." and "Pet. Br. App." refer to the brief and appendix filed by the Petitioner; "J.A." refers to Joint Appendix; "States of Colorado, et al. Amicus Br." and "States of Colorado, et al. Amicus Br. App" refer to the brief and appendix filed on behalf of the various States' Attorneys General; "U.S. Amicus Br." refers to the brief submitted by the Solicitor General.

a plea hearing. *See id.* Because the trial judge failed to safeguard Felipe Tovar's fundamental right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution by failing to provide him with information sufficient to permit him to meaningfully consider the consequence of his participating in a plea hearing without counsel, Tovar's waiver of counsel was not knowing and voluntary and cannot be used to enhance his subsequent Operating While Intoxicated charge to a felony offense.

The right to counsel is a fundamental constitutional right under the United States Constitution. U.S. CONST. AMEND. VI; *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963). This fundamental right to counsel extends to plea proceedings. *Boyd v. Dutton*, 405 U.S. 1, 2 (1972). A defendant's waiver of this right, as any fundamental right, must be knowing and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In addition, a trial court must carefully scrutinize the propriety of such a waiver. *Id.*

The government has an interest in both punishing and deterring recidivism. *Ewing v. California*, 538 U.S. 11, ___, 123 S. Ct. 1179, 1181 (2003). At the same time, "the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result." *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972). Because "[t]here is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice,'" *id.* at 36, this Court ensures that any person pleading guilty to crimes without the aid of counsel is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975),

quot-ing Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942).

The decision to plead guilty frequently involves the making of difficult judgments. *McMann v. Richardson*, 397 U.S. 759, 769 (1970). Because many seemingly simple misdemeanor charges can become serious felonies if the offender becomes a recidivist, pleading guilty to a misdemeanor charge may be more complex than it first appears. It cannot reasonably be argued that Felipe Tovar knowingly and intelligently waived his fundamental right to counsel where he was never advised that he had any such right at his plea hearing, much less warned of the dangers and disadvantages of proceeding without counsel. *See, e.g., Nichols v. United States*, 511 U.S. 738, 748 (1994), *Lockyer v. Andrade*, 538 U.S. 63 (2003).

Amici offer the Court comprehensive judicial authority favoring a reading of the Sixth Amendment to militate in favor of a court providing a defendant with advice about the role of counsel in a plea proceeding and the risk of going forward without counsel before accepting a plea. The eighteen states and six federal circuits that have addressed the issue of waiver of counsel at a plea proceeding either require or strongly advise a trial court to admonish a defendant about the dangers of self-representation in the context of a plea proceeding. Only ten states (and no federal circuits) which have addressed this issue in the context of plea proceedings do not require a defendant to be warned of the dangers of self-repre-sentation, while the remaining states and federal circuits have not addressed the issue at a plea proceeding. Although not all jurisdictions have addressed the issue, a growing number of state and federal judicial authorities

recognize that this approach is not optional, but essential to compliance with the Sixth Amendment. The interpretation of these courts is in accord with *amici*'s view of the Sixth Amendment, our organizations' missions, and the NLADA's involvement in the 40th Anniversary campaign to realize the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). At the very least, a "best practices" approach dictates that the admonishments must be provided and a truly knowing and voluntary waiver obtained if the plea is to stand.

Because of the importance of ensuring that a defendant who waives counsel does so with his "'eyes open,'" *Faretta*, 422 U.S. at 835, *quoting Adams*, 317 U.S. at 279, this Court should require that a defendant be fully apprised of the consequences of participating in a plea hearing without the assistance of counsel.

I. MANY STATES AND FEDERAL CIRCUITS EITHER REQUIRE OR STRONGLY ADVISE TRIAL COURTS TO ADMONISH A DEFENDANT ABOUT THE DANGERS OF SELF-REPRESENTATION.

The Iowa Supreme Court's decision regarding the knowing, voluntary and intelligent waiver of the Sixth Amendment right to counsel is in harmony with decisions in many other states and federal circuits. Certain states and federal circuits—including the Fifth, Sixth, Eighth, Ninth, and District of Columbia Circuits, as well as Alaska, Arkansas, Connecticut, Florida, Missouri, New York, Ohio, Pennsylvania, and Wisconsin—require the trial court to admonish a defendant who wishes to proceed *pro se* at a plea

hearing about the dangers of self-representation. Other states and federal circuits—including the Second Circuit, California, Hawaii, Indiana, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee, and Vermont—strongly advise trial courts to warn a defendant about the dangers of self-representation and employ a totality of the circumstances analysis when reviewing whether a waiver of counsel was knowing and voluntary.

A. Many States and Federal Circuits Require a Waiver of Counsel Colloquy that Follows the Guidance of *Faretta* or Warns about the Dangers of Self-Representation if a Defendant Chooses to Proceed *Pro Se* at a Plea Hearing.

1. Federal Circuits

As the Iowa Supreme Court correctly observed, Pet. App. at 16-17, the Ninth Circuit requires that a defendant be "made aware of the dangers and disadvantages of self-representation" before being allowed to plead guilty. *United States v. Akins*, 276 F.3d 1141, 1146 (9th Cir. 2002) (quoting *Faretta*, 422 U.S. at 835). If the record does not reveal a colloquy between the defendant and the magistrate, the reviewing court will consider the background of the defendant, as well as anything in the record which may show that the defendant understood the disadvantages of representing himself. Most importantly, the Ninth Circuit applies this standard of warning to misdemeanor proceedings, noting that the legal system is no less complex for a defendant facing a misdemeanor. *Id.* at 1148 (citing *Argersinger*, 407 U.S. at 34). Contrary to the State's assertion that the Ninth Circuit's decision is a minority position, Pet. Cert. 17, other federal circuits—including the Fifth, Sixth, Eighth and the District of Columbia—also require a trial court to warn a

defendant wishing to proceed *pro se* at a guilty plea hearing about the dangers of self-representation.

The Eighth Circuit requires trial courts to warn defendants of the dangers of proceeding *pro se*. *Shafer v. Bowersox*, 329 F.3d 637, 647-48 (8th Cir. 2003). In *Shafer*, the Eighth Circuit reasoned that—even in a guilty plea proceeding—a waiver-of-counsel colloquy should include a "penetrating and comprehensive examination of all the circumstances under which a plea is tendered," *id.* at 647, *citing Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948), and an awareness "of the dangers and disadvantages of self-representation so that his 'choice is made with eyes open.'" *Id.* at 648

Similarly, a defendant in the Fifth Circuit cannot proceed *pro se* in a misdemeanor plea proceeding without first discussing with the trial court the advantages of legal representation. *United States v. Davis*, 269 F.3d 514, 518-19 (5th Cir. 2001).

The Sixth Circuit has followed the lead of the District of Columbia Circuit by invoking its supervisory powers to specify the procedure that all federal district judges in its circuit must follow "in situations where an accused seeks to waive representation by counsel and proceed *pro se*." *United States v. McDowell*, 814 F.2d 245, 249-51 (6th Cir. 1987), *cert. denied* 484 U.S. 980 (1987) (citing *United States v. Bailey*, 675 F.2d 1292, 1297 (D.C. Cir. 1982), *cert. denied* 459 U.S. 853 (1982), and adopting the model inquiry from 1 *Bench Book for United States District Judges* 1.02-2 (3d ed. 1986)). Although the case in which the Sixth Circuit announced its rule was in the context of a *pro se* defendant at trial, and not in the context of a plea proceeding, the Sixth Circuit used its supervisory power to require future district court judges to cover the same substantive points as in the district judge benchbook, along with an express finding that the accused

has made a knowing and voluntary waiver "whenever . . . an accused . . . wishes to represent himself in criminal proceedings." *McDowell*, 675 F.2d at 250.

2. States

Alaska mandates a detailed colloquy before a defendant's waiver of the right to counsel can be deemed valid. *Swenson v. Municipality of Anchorage*, 616 P.2d 874, 878 (Alaska 1980). In *Swenson*, the defendant sought to withdraw his guilty plea for operating a motor vehicle while under the influence of intoxicants ("OMVI"). *Id.* at 876-877. He argued that his uncounseled guilty plea was invalid because the trial court failed to secure a knowing and intelligent waiver of counsel. *Id.* at 877. The Supreme Court of Alaska agreed, holding that a waiver of counsel cannot be valid without a detailed explanation of the benefits of counsel. *Id.* at 877-78.

Arkansas also requires the trial court to at least apprise the defendant of the dangers of self-representation before he or she can waive the right to counsel at a guilty plea proceeding. *King v. State*, 804 S.W.2d 360, 362 (Ark. 1991).

In Connecticut, the court must make the defendant aware of the dangers of self-representation before allowing the defendant to waive his right to counsel for a guilty plea. *See State v. Smith*, 558 A.2d 257 (Conn. App. 1989). Although *Smith* was decided in the context of a probation revocation proceeding, the reach of the opinion extends to waiver of counsel at any criminal proceeding. *Id.* at 260.

The Supreme Court of Florida requires a *Faretta* inquiry at each stage of the criminal process—regardless of whether the defendant is pleading guilty or proceeding to trial. FLA. R. CRIM. P. 3.111(d). *See Clary v. State*, 818 So.2d 686 (Fla. Dist. Ct. App. 2002). In fact, a trial court's failure to conduct a *Faretta* inquiry is *per se* reversible error that is not subject

to harmless error analysis. *Id.*[3]

The Missouri Supreme Court has recently been advised, through the Eighth Circuit's decision in *Shafer v. Bowersox*, 329 F.3d 637 (8th Cir. 2003) (discussed *supra*), that the limited exchange it had approved for waiver of counsel in plea proceedings was not a reasonable application of clearly established federal law because it "did not advise [the defendant] of specific dangers or limitations related to self representation." *Shafer*, 329 F.3d at 648. The recently clarified standard in Missouri is thus the hybrid *Faretta-Von Moltke* colloquy delineated by the Eighth Circuit. *See supra* I(A)(1).

The New York Court of Appeals has long held that—even in an arraignment or plea proceeding—a trial court may not accept a defendant's waiver of counsel until it has engaged in a sufficiently searching inquiry that assures that the defendant appreciated the dangers and disadvantages of waiver. *People v. White*, 436 N.E.2d 507, 511 (N.Y. 1982)

Ohio courts will not find a knowing and intelligent waiver of counsel if the trial court "failed to thoroughly investigate whether [the defendant] had an understanding of the entire matter and an awareness of the hazards of representing himself." *State v. Obermeyer*, 787 N.E.2d 729, 731 (Ohio Ct.

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[3] Petitioner references Florida law to support its argument that a guilty plea colloquy is sufficient to warn a defendant of the consequences of self-representation at a plea proceeding. Pet. Brief at 24 (citing FLA. R. CRIM. P. 3.172 for that proposition that a separate waiver colloquy is unnecessary when the trial court secures a factual basis before accepting the defendant's guilty plea). In Florida, however, the inquiries made during a guilty plea will not suffice to establish a knowing, intelligent and voluntary waiver of counsel. *See Clary v. State*, 818 So.2d 686, 688 (Fla. Dist. Ct. App. 2002). On the contrary, the Supreme Court of Florida mandates *both colloquies* when a defendant seeks to plead guilty without counsel. *Compare* FLA. R. CRIM. P. 3.111(d) with FLA. R. CRIM. P. 3.172.

App. 2003). In finding that the defendant did not knowingly, intelligently, and voluntarily waive his right to counsel, the appellate court observed that for a "waiver to pass constitutional muster, the defendant must have 'some sense of the magnitude of the undertaking and hazards inherent in self-representation.'" *Id. at* 731 .

Pennsylvania has a procedural rule which directs trial courts to warn defendants of the risks of proceeding without counsel before accepting a waiver of counsel. *See* PA.R.CRIM. 121. In *Commonwealth v. Payson*, 723 A.2d 695 (Pa. Super. Ct. 1998), the appellate court invalidated the defendant's uncounseled guilty plea due to the insufficiency of defendant's waiver of counsel and adopted the extensive, six-point *Faretta*-style colloquy proposed in the comment to Rule 121. *Id.* at 700, 704. Because the trial court failed to conduct the requisite colloquy, the defendant had not knowingly and voluntarily waived his right to counsel. *Id.* at 704. *See also Commonwealth v. McDonough*, 812 A.2d 504, 506-507 (Pa. 2002).

Wisconsin also affirmatively requires a detailed waiver inquiry. *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997). In *Klessig*, the Supreme Court of Wisconsin instructed trial courts to conduct a colloquy to make certain that the defendant: (1) made a deliberate choice to proceed without counsel; (2) was aware of the difficulties and disadvantages of self-representation; (3) was aware of the seriousness of the charge or charges against him; and (4) was aware of the general range of penalties that could have been imposed on him. *Id.* at 721 (overruling its earlier decision in *Pickens v. State*, 292 N.W.2d 601 (Wis. 1980), under which a colloquy was preferred but not required). The *Klessig* court held that when the circuit court fails to conduct the four-factor colloquy, reviewing courts must remand the case to an evidentiary hearing

to determine whether the defendant's waiver was knowing, intelligent, and voluntary.

B. Other States and Federal Circuits Prefer Trial Courts to Warn Defendants Who Wish to Proceed *Pro Se* at a Plea Hearing About the Dangers of Self-Representation.

In addition to jurisdictions which explicitly direct trial courts to discuss with the defendant the dangers of self-representation, other jurisdictions—including the Second Circuit, California, Hawaii, Indiana, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee, and Vermont—have expressed a preference for such a discussion. In these jurisdictions, while trial courts are urged to conduct a meaningful inquiry, a failure to do so will not result in reversal if there is an objective indication that the defendant was aware of the dangers of self-representation.

1. Federal Circuit

According to the Second Circuit, *Faretta* does not mandate explicit warnings of the dangers and disadvantages of self-representation. *Dallio v. Spitzer,* 343 F. 3d 553, 561-62 (2d Cir. 2003). Although the Second Circuit acknowledges that *Faretta* instructs that a defendant "should be made aware of the dangers and disadvantages of self-representation," the Second Circuit views that statement as more of a "strong admonition than...a legal mandate." *Id* at 562-63 (rejecting "rigid waiver formulas or scripted procedures" and instead applying a totality of the circumstances analysis in evaluating waiver of counsel at a pre-trial suppression hearing). Despite its position that the *Faretta* warning about the dangers of self-representation is dictum, *id.* at 621, the Second Circuit has "strongly endorsed *Faretta* warnings as a factor important to the knowing and intelligent waiver of counsel." *Id.* at 563.

After explaining that its decision was narrowly focused on examining whether a state court's ruling fell within the scope of 28 U.S.C. § 2254(d), the Second Circuit noted that the cautionary approach of requiring *Faretta* warnings as a minimum requirement would be "understandable, even laudable, were a district court itself addressing a criminal defendant intent on proceeding *pro se*." *Id.* at 564. This observation suggests that the Second Circuit prefers *Faretta* warnings in the context of a plea proceeding, although it does not require them.

2. States

Minnesota trial courts will not accept an uncounseled guilty plea unless the trial court has made a "penetrating and comprehensive examination of the defendant" to assure—at the very least—that the defendant has a full knowledge and understanding of his or her rights. *State v. Rubin*, 409 N.W.2d 504, 506 (Minn. 1987) (citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948), and MINN.R.CRIM.P. 5.02). The Supreme Court of Minnesota has even gone so far as to strongly urge trial courts to require a defendant to discuss the consequences of waiver with an attorney before accepting the waiver. *Burt v. State*, 256 N.W.2d 633, 635 (Minn. 1977).

Although preferring a *Faretta*-type colloquy, the Nebraska Supreme Court observes that, at a minimum, a knowing and intelligent waiver of counsel at a guilty plea hearing should ensure that "the accused [is] made sufficiently aware of the right to have counsel present and of the possible consequences of a decision to forego counsel." *State v. Dunster*, 631 N.W.2d 879, 898 (Neb. 2001), *cert. denied* 535 U.S. 908 (2002). In *Dunster*, a capital defendant waived counsel at his capital guilty plea and sentencing hearings. *Id.* at 889-893. Before accepting the waiver, the trial court not only warned defendant Dunster about the consequences of proceeding *pro se*, but also appointed another attorney to

advise him about the ramifications of proceeding *pro se*. *Id.* at 889-891. In finding Dunster's waiver knowing and voluntary, the Nebraska Supreme Court highlighted that a "trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but that warning is not required." *Id.*; *compare State v. Werner*, 600 N.W.2d 500, 507 (Neb. App. Ct. 1999) (signed, standard waiver forms, which inform defendants of their right to counsel, are sufficient to show defendant "knowingly, intelligently, and voluntarily, waived her right to counsel").

Other states that prefer but do not require a defendant to be specifically warned of the dangers of self-representation include: *Benge v. Superior Court*, 167 Cal. Rptr. 714 (Cal. Ct. App. 1980); *State v. Merino*, 915 P.2d 672, 695-96 (Haw. 1996); and *Shelton v. State*, 390 N.E.2d 1048, 1051 (Ind. App. 1979); *compare Redington v. State*, 678 N.E.2d 114, 118-120 (Ind. 1997) (clarifying that admonishments "regarding the dangers of self-representation at trial . . . are inapplicable" in the context of a plea proceeding because "a trial court is not required to engage in superfluous warnings which have no bearing to the proceeding at hand," but not disturbing *Shelton*'s observations regarding the importance of counsel in the context of plea proceedings).

In *State v. Fulp*, 558 S.E.2d 156, 159 (N.C. 1999), the Supreme Court of North Carolina relied on its state statute to discuss what constitutes a voluntary waiver of counsel for the purposes of entering a plea. *Id.* at 159 (citing N.C.G.S. § 15A-1242 (1999)). One of the requirements is that the trial judge must make "thorough inquiry" and be "satisfied" that the defendant "[u]nderstands and appreciates the consequences of this decision." § 15A-1242(2). The *Fulp* court conducted a totality of the circumstances analysis to conclude that the defendant knowingly, voluntarily, and intelligently

waived his right to counsel. *Id.* at 159. In so doing, the court also noted that *Fulp* had signed a written waiver form. *Id.* at 161-62.

The Supreme Court of South Carolina encourages *Faretta* inquiries without directly mandating their use each time the accused purports to waive the right to counsel. *Prince v. State*, 392 S.E.2d 462 (S.C. 1990) (citing *Faretta v. California*, 422 U.S. 806 (1975)). In *Watts v. State*, 556 S.E.2d 368 (S.C. 2001), South Carolina found a plea of guilty invalid when: (1) the trial judge failed to address the disadvantages of appearing *pro se*; and (2) the record was devoid of any indication that the accused could make an intelligent waiver without proper *Faretta* warnings. *Watts*, 566 S.E.2d at 370-371.

Tennessee courts have also stressed the importance of warning a defendant who wishes to proceed *pro se* at a guilty plea about the dangers of self-representation. *Smith v. Tennessee*, 987 S.W.2d 871 (Tenn. Crim. App. 1998). In *Smith*, the Tennessee Court of Criminal Appeals noted that "failure to warn of the specific dangers of self-representation is the area of primary concern" when dealing with waivers of counsel. *Id.* at 877. The court invalidated the defendant's purported waiver, holding that even when the defendant appears to have prior experience with the criminal justice system, the trial court should establish a record indicating that the defendant was aware of the dangers of proceeding *pro se*. *Id.* at 877.

Vermont—before accepting a defendant's waiver of counsel at a plea proceeding—instructs that trial courts should first "conduct sufficient inquiry into the defendant's experience, motives, and understanding of what he is undertaking to determine the quality of his purported waiver' and then 'provide a clear explanation of the adverse consequences

of *pro se* representation." *State v. Pollard*, 657 A.2d 185, 190-91 (Vt. 1995).

II. SOME JURISDICTIONS DO NOT ADVISE TRIAL COURTS TO WARN DEFENDANTS OF THE DANGERS OF SELF-REPRESENTATION IN PLEA PROCEEDINGS, WHILE OTHERS HAVE NOT EXPLAINED WHAT A TRIAL COURT SHOULD ADVISE A DEFENDANT WHO WISHES TO PROCEED *PRO SE* AT A PLEA HEARING.

Although eighteen states and six federal circuits either require or strongly prefer the trial court to warn a defendant wishing to proceed *pro se* at a guilty plea hearing about the dangers of self-representation, ten states (and no federal jurisdictions) neither require nor advise such a colloquy in plea proceedings. These state jurisdictions reflect a minority viewpoint that the Iowa Supreme Court chose not to follow. The remaining states and federal jurisdictions have not explained what a trial court should advise a defendant who wishes to proceed *pro se* at a plea hearing.

A. A Smaller Number of States Do Not Specifically Advise a Trial Court to Warn a Defendant about the Dangers of Self-Representation in a Plea Proceeding.

Of the federal circuits which have examined the requirements of waiver of counsel in the context of a plea proceeding, all have at least advised the federal district court to warn of the dangers of self-representation. *See supra*, Section I(A) and (B). The ten states that have addressed the issue of what constitutes a knowing waiver of counsel in the context of a guilty plea proceeding—Arizona, Idaho, Illinois, Louisiana, Michigan, Montana, Nevada, South Dakota, West Virginia, and Texas—neither require nor advise a trial court to warn a

defendant about the dangers of self-representation. Some of these states do not mandate the *Faretta* warning in a plea proceeding because they are not convinced that a plea hearing is sufficiently complex to warrant such an admonishment.

For example, while Idaho adheres to *Faretta* warnings and mandates that a defendant wishing to proceed *pro se* at trial should be made aware of the dangers and disadvantages of representing himself, *State v. Maxey,* 873 P.2d 150, 153 (Idaho 1994), it contrasts these warnings with the admonitions necessary for a *pro se* plea hearing. *Id.* at 154. In the context of a plea hearing, Idaho courts are "not convinced . . . that the judgments that confront a defendant who pleads guilty in a misdemeanor case are sufficiently difficult to warrant a requirement that the trial court must advise the defendant of the problems inherent in entering a plea without counsel." *Id.* at 154. Similarly, South Dakota does not require "advisement on the dangers of self-representation" before "waiver of the right to counsel" may be accepted and does not believe that the *Faretta* inquiries apply to waiver of counsel at a plea. *State v. Cashman,* 491 N.W.2d 462, 463 (S.D. 1992), *cert. denied* 507 U.S. 966 (1993). In so holding, the court stated it was "obvious that Cashman had to know 'what a lawyer could do for him . . .' during the entry of his plea, namely: advise him not to plead guilty."[4] *Id.* at 465-66 (internal citations and quotations omitted).

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[4] The Iowa Supreme Court examined the argument about the relative unimportance of counsel at a plea hearing and found such a conclusion "overly simplistic." J.A. at 15. The Iowa Supreme Court instead safeguarded the fundamental right to counsel by requiring a more detailed admonishment, acknowledging that an attorney's role in a plea proceeding goes well beyond merely advising a defendant not to plead guilty: it is "multi-faceted" and not "one-dimensional." J.A. at 15.

Other states that do not specifically require warnings of the dangers of self-representation nonetheless follow the principle that the waiver colloquy must be distinct from the plea colloquy. For example, the Michigan Court of Appeals has specified that a "mere recitation of rights followed by a plea of guilty does not constitute an express waiver." *People v. Gonzales,* 446 N.W.2d 296, 298 (Mich. Ct. App. 1989).

For Illinois, the State cites *People v. Christensen,* 555 N.E.2d 422 (Ill. App. Ct. 1990) for the principle that "waiver [is valid when] defendant receive[s] [a] valid guilty plea colloquy, including advisory charges, punishments, and right to counsel." Pet. Br. App. at 5. In finding that the defendant's plea was intelligent and voluntary, however, the *Christensen* court noted that at the hearing, the defendant questioned the court several times about her right to an attorney and the court even took a "recess so that the assistant State's Attorney could speak to defendant about obtaining an attorney." *Id.* at 424. Thus, even though one Illinois appellate court seems to have required a minimal waiver of counsel colloquy that does not include specific warnings about the dangers of self-representation, in the context of *Christensen* it is unclear what the defendant was actually told. *Also compare People v. Lego,* 660 N.E.2d 971, 973 (Ill. 1995) (in the context of reviewing waiver of *pro se* defendant at trial, the Illinois Supreme Court stated: "Although a defendant need not possess the skill and experience of a lawyer in order to choose self-representation competently and intelligently, he should be made aware of the dangers and disadvantages of self-representation . . . . This requirement of knowing and intelligent choice calls for nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.").

Other states that have adopted lax standards when recon-

ciling the fundamental right to counsel with the equally fundamental right of self-representation include Louisiana and Texas. The Louisiana Supreme Court does not require any sort of colloquy between the trial judge and the defendant. *State v. Stevison*, 721 So.2d 843 (La. 1998). Similarly, Texas does not require a *Faretta*-type admonishment of the "dangers and disadvantages" of waiving counsel when a misdemeanor defendant is not contesting guilt. *Hatten v. State*, 71 S.W.3d 332, 334 (Tex. Crim. App. 2002). *See also State v. Natoli*, 764 P.2d 10, 11-12 (Ariz. 1988); *State v. Wolfe*, 75 P.3d 1271, 1272-73 (Mont. 2003)

Finally, in a pre-*Faretta* case, the Nevada Supreme Court held that in plea hearings, a defendant's waiver of counsel is valid if it is "made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Garnick v. Miller*, 403 P.2d 850, 853 (Nev. 1965). Nevada acknowledges, however, that there is a "strong presumption against waiver of the constitutional right to counsel," *id.* at 853, and consequently "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." *Id.* The Nevada court has not expressly changed this position post-*Faretta*. *See, e.g.*, *Beals v. Nevada*, 802 P.2d 2 (Nev. 1990) (defendant's waiver of counsel at sentencing invalid) (citing *Garnick* and *Von Moltke*). *See also State v. McCraine*, 588 S.E.2d 177, 179 (W.Va. 2003) and *State v. Armstrong*, 332 S.E.2d 837, 842 (W.Va. 1985) (completion of a written waiver form is prima facie evidence of waiver of the right to counsel, although completion of the form is not conclusive proof of knowing and intelligent waiver).

B. The Remaining States and Federal Circuits Have Not Specified What the Trial Court's Inquiry Should Include When a Defendant Wishes to Proceed *Pro Se* at a Plea Hearing, Although Most Have Specified What the Inquiry Should Include for a *Pro Se* Defendant atTrial.

1. Federal Circuits

The remaining federal circuits—the First, Third, Fourth, Seventh, Tenth, and Eleventh—have not specified what a trial court should ask a defendant who wishes to proceed *pro se* at a plea hearing post-*Faretta*, although they have examined the issue in the context of a defendant who wishes to proceed *pro se* at trial.

In the context of a defendant requesting to proceed *pro se* at trial, the First Circuit has delineated the following waiver requirements:

> What is required, we think, is a sense of the magnitude of the undertaking and the "disadvantages of self-representation," an awareness that there are technical rules governing the conduct of a trial, and that presenting a defense is not a simple matter of telling one's story. . . .We repeat, however, that the defendant's knowledge of these relevant facts need not appear on the record at trial. The district court may properly consider, in addition to [the defendant's] background, experience and conduct, such factors as his involvement in previous criminal trials, his representation by counsel before trial, and the continued presence of advisory counsel at trial in determining whether he knew what he was getting into.

United States v. Campbell, 874 F.2d 838, 846 (1st Cir. 1989), *citing, inter alia*, *Maynard v. Meachum*, 545 F.2d 273, 279 (1st Cir. 1976) and *Faretta*, 422 U.S. at 835 (internal citations omitted). While mandating that the defendant have "a sense of the magnitude of the undertaking and the 'disa-

vantages of self-representation,'" *id.*, *citing Faretta*, 422 U.S. at 846, the First Circuit "'has not interpreted these decisions to mean that the district court must issue a particular warning or make specific findings of fact before it allows the defendant to proceed *pro se*.'" *Id.* at 845, *citing United States v. Hafen*, 726 F.2d 21, 25 (1st Cir. 1984), *cert. denied* 466 U.S. 962 (1984). Thus, while the First Circuit has not expressly addressed this issue in the context of waiver of counsel at plea proceeding, in the context of a waiver of counsel at trial, the First Circuit mandates that the defendant have a sense of the disadvantages of self-representation. *Id.* While it believes such "on the record findings are almost always wise, they are not mandated." *Id.* at 845.

The Third Circuit has also not addressed the waiver of counsel issue in the context of a plea proceeding, although it has addressed it in other contexts. In *United States v. Welty*, 674 F.2d 185 (3rd Cir. 1982), after a defendant represented himself for the first two days of trial, the judge refused the defendant's request that an attorney take over his case and finish the trial. *Id.* at 186-87. In examining what a trial judge should discuss with a defendant wishing to proceed *pro se* at trial, *Welty* observed that the court "has the responsibility of ensuring that any choice of self-representation is made knowingly and intelligently, with an awareness of the dangers and disadvantages inherent in defending oneself." *Id.* at 188. In *United States v. Salemo*, 61 F.3d 214 (3rd Cir. 1995), *cert. denied* 516 U.S. 1001 (1995), which involved a defendant representing himself at a sentencing hearing, the Third Circuit examined what a trial court should tell a defendant wishing to proceed *pro se* at sentencing. *Id.* at 219. The court emphasized that "the inquiry at sentencing need only be tailored to that proceeding and the consequences that may flow from it." *Id.* at 219. While acknowledging that "it need not be as exhaustive and searching as a similar inquiry before the conclusion of trial," *id.* at 219, the Third Circuit nonetheless

required that the "court's inquiry must be calculated to insure that the defendant is 'made aware of the dangers and disadvantages of self-representation, so that the record will establish that he[/she] knows what he[/she] is doing and [the] choice is made with eyes open.'" *Id.* at 220, *citing Faretta*, 422 U.S. at 834. Whether the Third Circuit would require the same standard in the context of a plea proceeding remains an open question.

The Fourth Circuit has examined what constitutes a knowing and voluntary waiver of counsel in the context of a pre-*Faretta* plea proceeding. *Aiken v. United States*, 296 F.2d 604 (4th Cir. 1961). At that time, the Fourth Circuit held that a lower court was required to "(1) explain the charges and the possible punishment; (2) inquire whether any threats or pressures have been brought to bear on him, and (3) determine whether any promises have been made to [the defendant] by the investigating or prosecuting officials." *Id.* at 607. While the Fourth Circuit has not expressly modified *Aiken* in light of *Faretta*, it has addressed waiver of counsel issues in the context of trial. In *United States v. Gallop*, 838 F.2d 105 (4th Cir. 1988), *cert. denied* 487 U.S. 1211 (1988), the court discussed *Aiken* in the context of the denial of a request for substitution of counsel at trial resulting in the defendant proceeding *pro se* and noted the importance of the defendant's understanding of the dangers and disadvantages of self-representation. *Id.* at 110. In *United States v. Singleton*, 107 F.3d 1091 (4th Cir. 1997), *cert. denied* 522 U.S. 825 (1997), a defendant waived counsel in the course of trial, although his previous counsel remained in the courtroom and spoke with him during some breaks. *Id.* at 1094-95. The court "affirmed open court exploration of the defendant's background capabilities and understanding of the dangers and disadvantages of self-representation but refused to treat the failure to conduct a formal inquiry as *per se* reversible error." *Id.* at 1097-98 (citing *Gallop*, 838 F.2d at 110). Whether the Fourth Circuit would

apply this same standard in the context of waiver of counsel at plea proceedings remains undecided.

It is equally unclear what safeguards the Seventh Circuit would impose to protect the fundamental right to counsel in guilty plea proceedings. In *Day v. United States*, 357 F.2d 907 (7th Cir. 1966), the Seventh Circuit relied on *Von Moltke* to determine the sufficiency of the defendant's waiver of counsel upon entering his guilty plea. The court found that "the fact that the petitioner stated flatly that he did not want counsel should not have foreclosed all further inquiry" and remanded for a hearing to determine the extent of the defendant's awareness and understanding. *Id.* at 910-11. *Day*, however, was decided before this Court's decision in *Faretta*. Since *Day*, in the context of waiver of counsel at trial, the Seventh Circuit found that although the "trial court never advised [the defendant] as to the dangers and disadvantages of self-representation, the court did give such advice to [two co-defendants] at the time when [the defendant] was present in court." *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980). While the *Trapnell* court "believe[d] that a fuller explanation of the drawbacks of self-representation should have been made by the trial court to [the defendant]," *id.* at 1029, the court found that the record established his decision to represent himself was "made intelligently and with knowledge of the dangers and disadvantages of self-representation. . . ." *Id.* at 1029.[5]

The Tenth Circuit has adopted a pragmatic approach which tailors the warnings of proceeding without counsel to the particular proceeding. *Braun v. Ward*, 190 F.3d 1181 (10th Cir. 1999), *cert. denied* 529 U.S. 1114 (2000). In

[5] Petitioner cites *United States v. Hill*, 252 F.3d 919 (7th Cir. 2001), *cert. denied* 536 U.S. 962 (2002), for the proposition that a mechanical inquiry will not always ensure a defendant's understanding. *See* Pet. Br. at 21, 31. *Hill*, however, is not wholly apposite since it involved a waiver of counsel during a trial where the defendant had standby counsel. *See Hill*, 252 F.3d at 923.

Braun, the defendant waived counsel at an evidentiary hearing to withdraw an earlier plea. *Id.* at 1187. Even in this context, the Tenth Circuit found it necessary to warn the defendant of both the seriousness of the proceeding and the specific dangers he would face if he proceeded *pro se*. *Id.* at 1187. The Tenth Circuit has not yet addressed whether this same standard would extend to waiver of counsel at a plea hearing.

Lastly, the Eleventh Circuit is also unclear about what safeguards are required to ensure a valid waiver of counsel at a plea proceeding. *See Stano v. Dugger*, 921 F.2d 1125 (11th Cir. 1991), *cert. denied* 502 U.S. 835 (1991). As the Iowa Supreme Court observed, the *Stano* court "noted [only] that a defendant who pleads guilty need not be admonished of the dangers of proceeding *pro se* at trial as required by *Faretta*...." J.A. at 13. The Eleventh Circuit, however, did not clarify what admonishments were necessary. *See Stano*, 921 F.2d at 1148-1149. *See also* J.A. at 13-14 ("To simply conclude, as the State suggests, that a *Faretta*-type inquiry is not required at a guilty plea hearing does not answer the ultimate question of what colloquy is required"). *Compare United States v. Edwards*, 716 F.2d 822, 824 (11th Cir. 1983) (in the context of evaluating a waiver of counsel at trial, the Eleventh Circuit held the "trial judge must conduct a hearing to ensure that the accused understands the dangers and disadvantages of proceeding *pro se*").

2. States

The remaining states have yet to address what type of waiver-of-counsel colloquy is necessary to protect defendants' Sixth Amendment rights in the context of a plea proceeding, although many have addressed the question in the context of trial.

a. States that require awareness of dangers and disadvantages at trial.

Ten states require that the defendant be made aware of the dangers and disadvantages of self-representation at trial,

although these states have not specified the extent of waiver necessary for proceeding *pro se* at a plea proceeding: *Briscoe v. State*, 606 A.2d 103, 107-108 (Del. 1992); *McClinton v. United States*, 817 A.2d 844, 855 (D.C. 2003), *petition for cert filed*, __ U.S.L.W. ___ (U.S. Oct. 29, 2003) (No. 03-7227); *State v. Armstrong*, 731 P.2d 249, 256 (Kan. 1987); *State v. Barrett*, 577 A.2d 1167, 1171 (Me. 1990) ; *State v. Powell*, 607 A.2d 603, 606 (N.H. 1992) ; *State v. Williams*, 663 A.2d 1378, 1388-89; *State v. Plouse*, 64 P.3d 522, 529 (N.M. Ct. App. 2003); *State v. Chapman*, 721 P.2d 392, 396 (N.M. 1986) *com-pare State v. Montler*, 509 P.2d 252 (N.M. 1973) (pre-*Faretta* waiver of counsel at plea); *Fitzgerald v. State*, 972 P.2d 1157, 1162 (Okla. Crim. App. 1998), *cert. denied* ___ U.S. ___, 123 S. Ct. 1631 (2003);[6] *State v. Hasbrouck*, 57 P.3d 209, 210 (Ore. 2002); and *State v. Arguelles*, 63 P.3d 731, 750 (Utah 2003), *petition for cert. filed*, 72 U.S.L.W. 3348 (U.S. Nov. 4, 2003) (No. 03-680).

b. States that prefer, but do not require, warning of the dangers of self-representation at trial.

Eight of the remaining states prefer, but do not require, warnings of the dangers of self-representation at trial. Alabama courts acknowledge that "[t]he case law reflects that, while a waiver hearing addressing the disadvantages of a *pro se* defense is much to be preferred, it is not absolutely necessary." *Tomlin v. State*, 601 So.2d 124, 128 (Ala. 1991) (internal citations and quotations omitted). Instead of examining the trial court's admonitions to the defendant wishing

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6 The various States' Attorneys General—as *amici*—cite *Huckabay v. Page*, 438 P.2d 645 (Okla. 1968) in their appendix for the proposition of "[u]pholding the waiver of counsel at a guilty plea when defendant was informed of his right to counsel and the possible punishment range." *See* States of Colorado, et al. Amicus Br. App. at 12a. Although decided in the context of waiver of counsel at a plea proceeding, *Huckabay* was pre-*Faretta* and has not been cited by any court post-*Faretta*.

to waive counsel at trial, Alabama uses a totality of the circumstances analysis to determine whether a defendant knowingly and voluntarily waived his right to counsel. *Tomlin*, 601 So.2d at 128-29 (outlining six factors to consider when reviewing the totality of circumstances underlying defendant's waiver of counsel).

Colorado holds that a trial judge should go through a detailed colloquy with a defendant who wishes to represent himself *pro se* at trial, including advising him of the dangers of self-representation. *People v. Arguello*, 772 P.2d 87, 95-96 (Colo. 1989); *see also Commonwealth v. Martin*, 683 N.E.2d 280, 282 (Mass. 1997).

Rhode Island has specified that that its waiver analysis is "pragmatic and directed to the particular stage of the proceeding in question." *State v. Briggs*, 787 A.2d 479, 485 (R.I. 2001). Although it has not specified the minimum requirements for waiver of counsel at a guilty plea, in the context of reviewing the waiver of a defendant who represented himself at part of his trial, Rhode Island employs a totality of the circumstances analysis where an "accused should . . . 'be made aware of the dangers and disadvantages of self-representation.'" *Id.* at 485 (quoting *Faretta*, 422 U.S. at 836). The Rhode Island Supreme Court has explained that while a *Faretta* colloquy is preferable, it is not constitutionally required. *State v. Thornton*, 800 A.2d 1016, 1025-26 (R.I. 2002) .

Similarly, in the context of waiver of counsel at trial, the state of Washington prefers, although does not require, an on-the-record colloquy to ensure that the defendant is made aware of the risks and disadvantages of self-representation. *State v. Christensen*, 698 P.2d 1069, 1072 (Wash. Ct. App. 1985).

Other state cases decided in the context of *pro se* defendants at trial, where the state courts indicate they prefer that a defendant be warned of the dangers and disadvantages of self-representation but look to the totality of the record to

decide whether the waiver can be upheld, include *Matthews v. State*, 394 So.2d 304, 309 (Miss. 1981); *Watkins v. Commonwealth*, 494 S.E.2d 859 (Va. 1998); and *Mapp v. State*, 953 P.2d 140, 143-44 (Wyo. 1998)

c. States that do not explain the minimum inquiry necessary to waive counsel at trial.

The remaining states—Georgia, Kentucky, Maryland, and North Dakota—have not explicitly delineated the minimum requirement for ensuring a knowing and valid waiver of counsel in the context of a plea proceeding. The Supreme Court of Georgia has not announced a specific minimum inquiry that would ensure a knowing, voluntary and intelligent waiver. *See Larry v. Hicks*, 491 S.E.2d 373 (Ga. 1997). Georgia, however, has unambiguously held that a guilty plea colloquy is not sufficient to establish the validity of the defendant's waiver. *Id.* at 374-375. Similarly, North Dakota requires "specific inquiries" but has not delineated what those inquiries should include. *State v. Hendrick*, 543 N.W.2d 217, 219 (N.D. 1996) (noting pre-*Boykin* standard for reviewing 1966 guilty plea in North Dakota "depend[ed] on the totality of the circumstances, not specific recitals," and that current standard requires "specific inquiries" under *Boykin v. Alabama*, 395 U.S. 238 (1969) and North Dakota Rule of Criminal Procedure 11).

Kentucky and Maryland have also not discussed the necessary requirements for an adequate waiver. In Kentucky, in a case where a *pro se* defendant at trial had standby counsel who participated from time to time, the court stated that the "conduct of appellant, as disclosed by the record, in presenting his defenses puts the lie to [the] argument [that the trial judge should have advised him of the seriousness of the charges and the advisability of being represented by counsel]," *Dunn v. Commonwealth*, 573 S.W.2d 651, 652 (Ky. 1978), but the court did not specify the minimum requirements necessary. Lastly, although courts in Maryland must

follow Maryland Rule 4-215(a) in order to ensure a knowing and intelligent waiver, *Johnson v. State*, 735 A.2d 1003, 1016 (Md. 1999), that the rule does not outline the necessary inquiry between the trial court and the defendant wishing to proceed *pro se*.

CONCLUSION

This Court should ensure that the state and federal courts adopt a uniform reading of the Sixth Amendment with respect to the right to counsel in a plea proceeding. At a minimum, *amici curiae* respectfully urge this Court to affirm the reasoning and conclusion reached by the Supreme Court of Iowa in this case.

Respectfully submitted

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APPENDIX A
Chart of Jurisdictions' Requirements to accept a waiver of counsel

Require Waiver of Counsel at Plea Proceeding that Follows *Faretta's* Guidance	Strongly Advise Waiver of Counsel at Plea Proceeding that Follows *Faretta's* Guidance	Do Not Require Waiver of Counsel at Plea Proceeding that Follows *Faretta's* Guidance
Federal Circuits: Fifth, Sixth, Eighth, Ninth and D.C.	**Federal Circuit:** Second	**Federal Circuits:** None
States: Alaska, Arkansas, Connecticut, Florida, Iowa, Missouri, New York, Ohio, Pennsylvania and Wisconsin	**States:** California, Hawaii, Indiana, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee and Vermont	**States:** Arizona, Idaho, Illinois, Louisiana, Michigan, Montana, Nevada, South Dakota, Texas and West Virginia

Have Not Addressed Waiver of Counsel at Plea Proceeding, but Require *Faretta's* Guidance for Waiver of Counsel at Trial	Have Not Addressed Waiver of Counsel at Plea Proceeding, but Prefer *Faretta's* Guidance for Waiver of Counsel at Trial	Have Not Delineated Minimum Requirement for Waiver of Counsel at either Plea Proceeding or Trial
Federal Circuits: First, Third, Fourth, Seventh, Tenth and Eleventh	**Federal Circuits**: None	**Federal Circuits**: None
States: Delaware, District of Columbia, Kansas, Maine, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon and Utah	**States:** Alabama, Colorado, Massachu-setts, Mississippi, Rhode Island, Virginia, Washington, and Wyoming	**States:** Georgia, Kentucky, Maryland and North Dakota

Appendix B

Text of Statutes and Rules Referred to in Brief

1. Connecticut Practice Book § 961 provides: "A defendant shall be permitted to waive his right to counsel and shall be permitted to represent himself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

   (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

   (2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent himself;

   (3)Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and

   (4) Has been made aware of the dangers and disadvantages of self-representation."

2. Rule 39(a) of the Alaska Rules of Criminal Rule 39(a) provides: "The court shall advise a defendant who appears without counsel for arraignment, change of plea, or trial of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel." ALASKA R. CRIM. P. 39(a).

3. Florida Rule of Criminal Procedure 3.111(d) provides:

(d) Waiver of counsel

(1) The failure of a defendant to request appointment of counsel or the announced intention of a defendant to plead guilty shall not, in itself, constitute a waiver of counsel at any stage of the proceedings.

(2) A defendant shall not be considered to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation.

(3) Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

(4) A waiver of counsel made in court shall be of record; a waiver made out of court shall be in writing with not less than 2 attesting witnesses. The witnesses shall attest the voluntary execution thereof.

(5) If a waiver is accepted at any stage of the proceedings, the offer of assistance of

counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

FLA. R. CRIM. P. 3.111(d).

4. Rule 121 of the Pennsylvania Rules of Criminal Procedure permits waiver only when the trial court elicits from the defendant: (1) whether the defendant understands that he has a right to be represented by counsel and the right to free counsel if he is indigent; (2) whether the defendant understands the nature of the charges against him and the elements of each of those charges; (3) whether the defendant is aware of the permissible range of sentences and/or fines for the offense charged; (4) whether the defendant understands that if he waives the right to counsel he will still be bound by all the normal rules of procedure and the counsel would be familiar with those rules; (5) whether the defendant understands that there are possible defenses to these charges to which counsel might be aware, and if these defenses are not raised they may be lost permanently, and (6) whether the defendant understands that, in addition to defenses, the defendant has other rights that, if not timely asserted, may be lost permanently and that if errors occur and are not objected to or otherwise timely raised by the defendant, the objection to these errors may be lost permanently.

5. Minnesota Rule of Criminal Procedure 5.02 provides in relevant part:

(3) Waiver of Counsel, Misdemeanor. If a defendant

appearing without counsel charged with a misdemeanor punishable upon conviction by incarceration does not request counsel and wishes to represent himself or herself, the defendant shall waive counsel in writing or on the record. The court shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowedge and understanding of the defendant's rights. The court may appoint the public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

(4) Waiver of Counsel, Felony, Gross Misdemeanor. If a defendant appearing without counsel charged with a felony or gross misdemeanor does not request counsel and wishes to represent himself or herself, the court shall ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record. If the defendant refuses to sign the written waiver form, the waiver shall be made orally on the record. Prior to accepting any waiver, the trial court shall advise the defendant of the following: the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel. The court may appoint the public defender for the limited purpose of advising and consulting with the defendant as to the waiver. MINN.R.CRIM.P. 5.02.

6. North Carolina's 15A-1242 provides:

Defendant's election to represent himself at trial

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
(2) Understands and appreciates the consequences of this decision; and
(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments. N.C.G.S. 15A-1242.

7. Maryland Rule 4-215, "Waiver of Counsel," provides in pertinent part:

a. First appearance in court without counsel. At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:

(1)Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.
(2) Inform the defendant of the right to counsel and of the importance of the assistance of counsel.
(3)Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory

penalties, if any.
(4)Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.
(5)If the trial is to be conducted on a subsequent date, advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel.
The clerk shall note compliance with this section in the file or on the docket.

(b)Express waiver of counsel. If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until it determines, after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, that the defendant knowingly and voluntarily waived the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.